



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

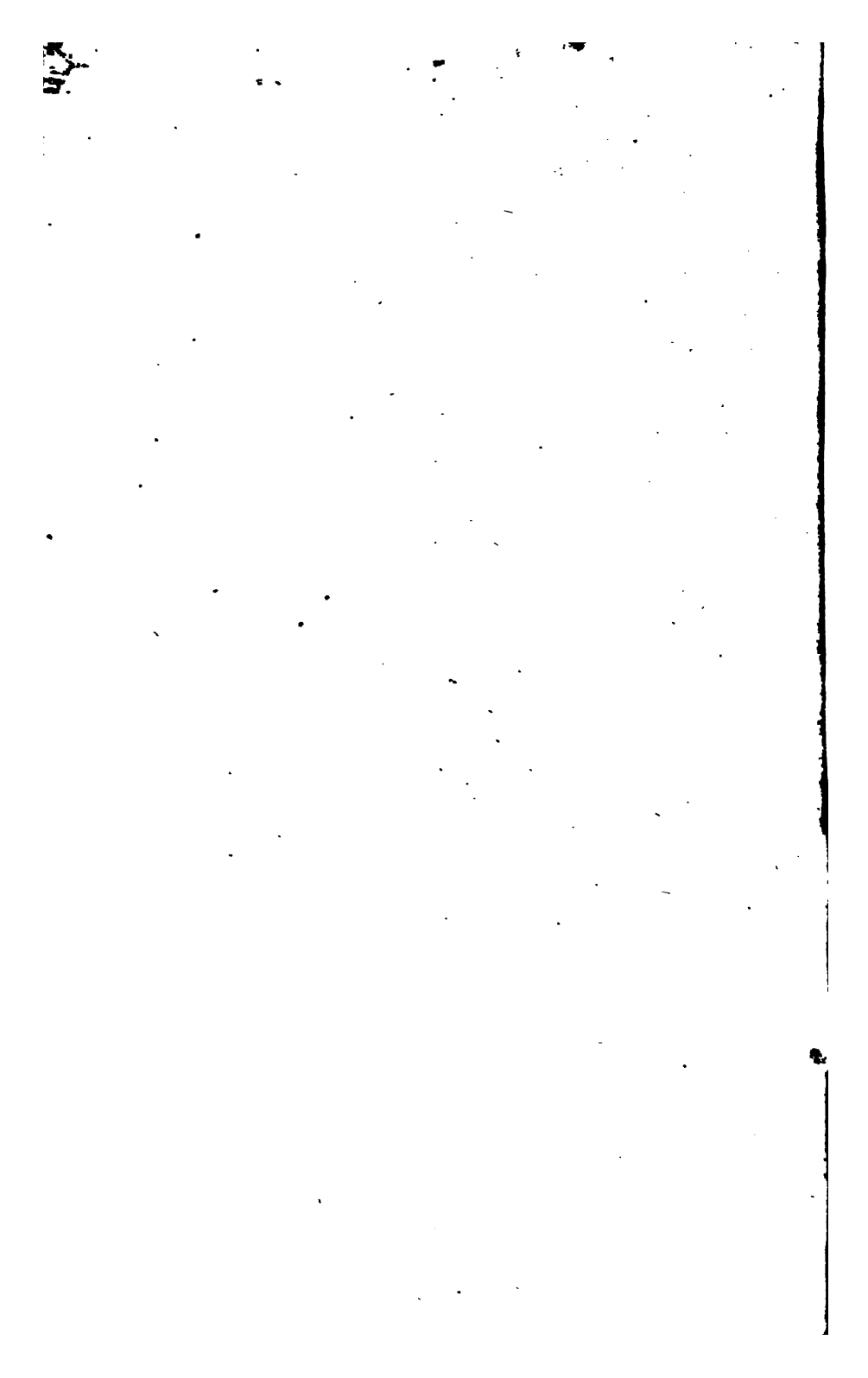
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

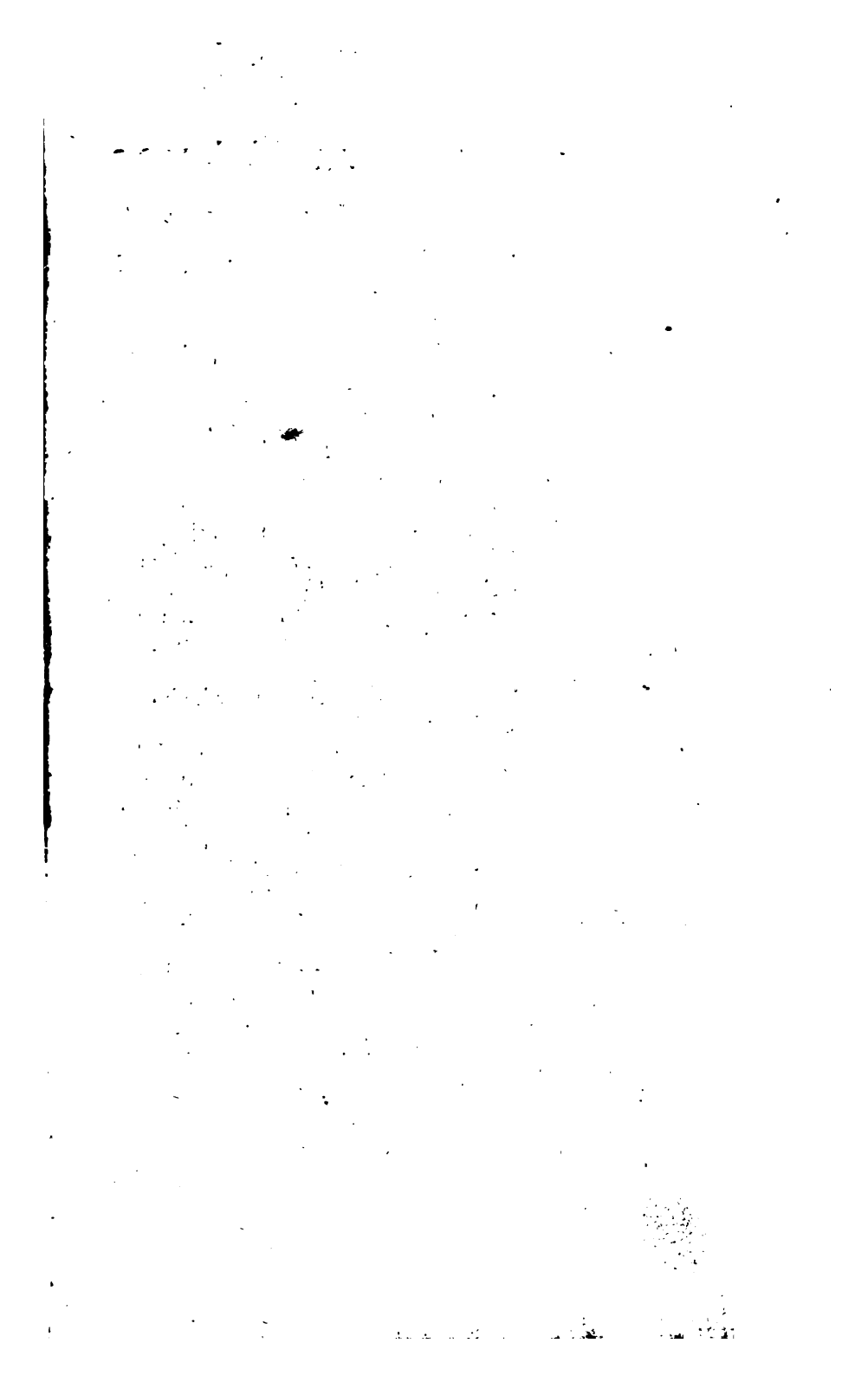
STANFORD LAW
LIBRARY



IN
MEMORY OF
HENRY VROOMAN

DL
424
IG. 13



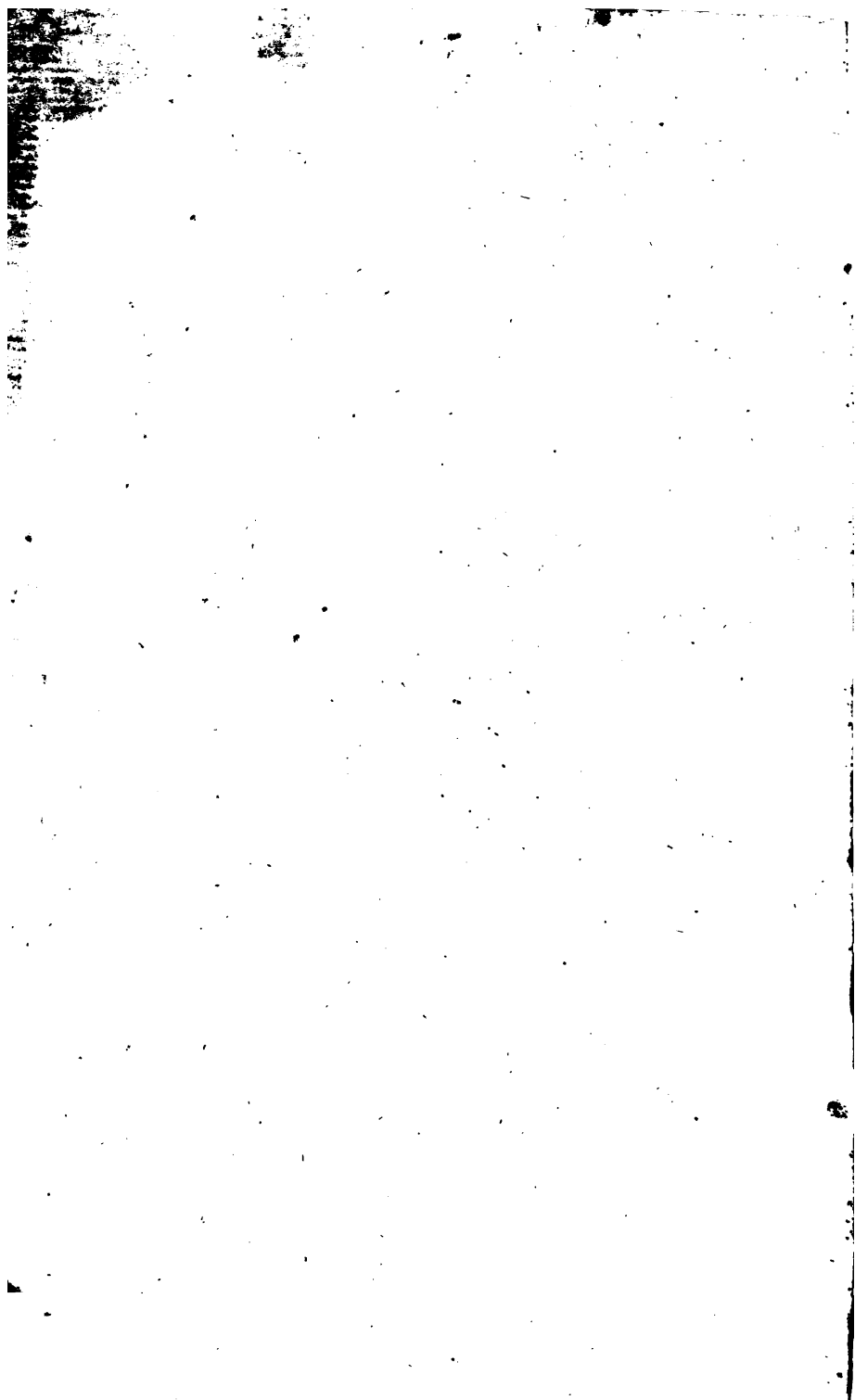


STANFORD LAW
LIBRARY



IN
MEMORY OF
HENRY VROOMAN

DL
AGH
IG.13





LAW - BOOKS lately published, wrote

By Lord Chief Baron *GILBERT*;

Sold by D. BROWNE, J. WORRALL, and
A. MILLAR.

1. **R** E P O R T S of Cases in Equity in the Courts of Chancery and Exchequer, from the 4th of Queen *Anne* to the 12th of King *George* the First. To which are added, some Select Cases in Equity in the Court of Exchequer in *Ireland*. The Second Edition, corrected, with additional Notes and References. Folio.
2. Historical View of the Practice of the Exchequer, and of the King's Revenues there answered. 8vo.
3. History and Practice of the Court of Common Pleas, teaching in an easy and familiar Method the Rules and Orders of conducting the Plea through every Branch of Practice. 8vo.
4. Law and Practice of Ejectments, to which are added select Precedents. 8vo.
5. Law of Evidence, corrected from the Errors of the *Irish* Edition, and many new References added. 8vo.
6. Law of Uses and Trusts, collected and digested in a proper Order from the Reports of adjudged Cases in the Courts of Law and Equity, &c. together with a Treatise on Dower. 8vo.
7. Law of Devises, Revocations and last Wills, with Precedents. 8vo.
8. Law of Distresses and Replevins delineated, where in the whole Law under those Heads is considered; what things may or may not be distrained; and the regular Method to be pursued in suing out Replevins, &c. agreeable to the present Practice. With many References to the best Authorities. To which is added an Appendix of *English* Precedents in Replevin.

A
T R E A T I S E
O F
T E N U R E S,
In T W O P A R T S;

CONTAINING,

- I. The Original, Nature, Use and Effect of
FEUDAL or COMMON LAW TENURES.
- II. Of CUSTOMARY and COPYHOLD
TENURES, explaining the Nature and Use
of COPYHOLDS, and their particular
Customs, with Respect to the Duties of the
Lords, Stewards, Tenants, Suitors, &c.

By the late Lord Chief Baron GILBERT.

The THIRD EDITION, to which are now added
Notes and References to the Common and Civil
Law-Books of the best Authority.

In the SAVOY:

Printed by *Henry Lintot*, Law-Printer to the King's most excellent
Majesty; for D. BROWNE at the *Black Swan*, J. WORRALL
at the *Dove*, both near *Temple-Bar*; and A. MILLAR at *Bu-
chanan's Head* opposite *Catherine-street* in the *Strand*. 1757.

RECEIVED

Journal of Management Education 30(6)

... ..

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

... ..

T H E
P R E F A C E.

THE general scope and design of the present discourse is to give the reader some clearer ideas of our tenures, both at common law and by custom, than have hitherto appeared in print; to which end our learned author has more especially commented and remarked on those two treatises of my lord *Coke*, that are most remarkable for either of these subjects, *viz.* his *Commentary on Littleton*, and his *Compleat Copyholder*: And accordingly this tract is divided into two parts or divisions.

In the former part our author, after he has laid down the principal rules that conduce to a right understanding of feudal tenures, proceeds

proceeds to shew how easily the grounds and reasons of our common law tenures may be apprehended and practised, by applying the rules of the feudal law to the cases that arise touching those tenures, or the incidents thereof.

And this he illustrates by instances taken from the various kinds of estates, seifins, disseifins, rights, entries, possessions, liveries, attornments, warranties, &c. and more especially explains that true and just distinction of right, *jus in re*, & *ad rem*, viz. a right of possession, and a right of property; and in what cases a claim, or entry, or action is given thereby, (as also how far a naked possession differs from a right of possession, and the consequences of either.)

He has also clearly explained the reason of those publick ceremonies and acts of notoriety, required by the feudal law, for the acquiring, possessing

The P R E F A C E.

v.

possessing and transferring of feuds, and which formerly were equally requisite in our common law tenures, *viz.* liveries, attornments, &c. the disuse whereof has not only occasioned an uncertainty in many titles and estates; but also introduced that mischievous practice of private and secret scoffments, by lease and release, covenants to uses, &c. and which in consequence has introduced a deluge of perjuries, forgeries, and other corruptions over the common law, and which can never be rectified, or the mischief redressed, till the common law be in that particular restored to the antient method of passing estates *in pais*, or by some publick act of notoriety.

The other part of this discourse, being properly a commentary on my lord *Coke's Compleat Copyholder*, has so well explain'd the doubtful parts of that discourse, and so fully evidenced,

evidenced, not only the nature and use of copyholds, and their particular customs, but also the *modus acquirendi, possidendi & transferendi* of these estates, and therein of surrenders, presentments, admissions, &c. the duties of lords, stewards, tenants and suitors, with the nature of fines, forfeitures, hariots, escheats, descents, &c. that I apprehend little more can materially be added to what our author has himself observed touching these particulars.

In this *Third Edition* are added notes and references to the common and civil law books of the latest and best authorities.

T H E

THE
ORIGINAL
OF
Feudal or Common Law
TENURES.

* Of Feuds.

A feud is a right that a vassal has Spelm. Rem. fo. 2. in some lands or some immovable thing of his lord's, to take the profits, paying the feudal duties.

† The feudal property was very unsettled in ancient times. The lords succeeded by election or strong hand; the

* The word *feudum* was not known here until about the year 1000. *Somner's Gavelkind*, p. 102.

† *Antiquissimo tempore sic erat in dominarum potestate connexum, ut quando bellent, possent auferre rem in feudum a se datum.* Feud. lib. 1. tit. 1.

B

tenants.

Of feudal or

tenants temporary, or at the will of their lords.

* When the barbarous nations had invaded the Roman empire, the vassal's estate became certain for life, then to all his descendants. Opposite to feudal property is *allodium*, which seems to be the old patrimonial property revived by the christian clergy among the barbarous nations. † This obtained among our Saxons, and gave birth to gavelkind.

Ld. Raym.
1024, 1292.

Salk. 243.

‡ Feuds are hereditary, or for life. In hereditary feuds the word *heirs* is required

* *Deinde statutum est ut assue ad vitam fidelis produceretur.* Feud. lib. 1. tit. 1.

† Somner's treatise of gavelkind, p. 8, 9, 115, 172.

‡ There are several divisions of feuds, viz. *Feudum nobile & ignobile.* Crag. de jure feud. § 6. Zafius in usus feud. fo. 5.

Feudum ligium & non ligium. Seld. tit. of honour, 38, 39.

Francum & non francum. Crag. de jure feud. p. 79.

Reale & personale, vel perpetuum & temporale. Zafius in usus feud. fo. 5.

Ecclesiasticum & seculare. Zafius, fo. 6.

Antiquum seu paternum & novum. Feud. lib. 3. tit. 50.

Dividuum & individuum. Crag. de jure feud. p. 58.

Masculinum & femininum. Zafius in usus feud. fo. 120.

common law tenures.

3

to distinguish it from the original feud that was for life only. In hereditary feuds the descent is to be considered, where the usage of other nations is to be compared with the feudal.

The notion of regular property begun among the *Jews* and *Egyptians*. The *Jews* were taught from heaven, and the *Egyptians* by the inundations of *Nile*, to settle in regular neighbourhood; and from the *Egyptians* the notions of property came to the *Greeks* and *Romans*.

Among the *Jews*, *Egyptians*, *Greeks* and *Romans*, the father was the head of the family, and had the inheritance and the power of life and death over his children (save that by the *Jewish* law it is tempered); for the father might not kill his son but in the presence of the publick magistrate. Deut. xxi. 15.

Among *Jews* and *Egyptians*, inheritance descended by settled rules in their tribes and families; and the will could only be made of acquisitions. Then they could not so make a will as to disinherit the eldest son of his right of primogeniture, which was that of a double portion. Deut. xxi. 15, 16, 17.

If a man died, the inheritance and acquisitions undivided descended to his sons equally; only the eldest had a double

The eldest son was to be sacrificed, and so was to be redeemed from the priest.

portion. This law arose because they apprehended such son the beginning of the father's strength; therefore he was to be thought sacred, and to be redeemed from the priest, and to bear the honourable charges and offices of the state: But because the words of the law give the reason, that the son was the beginning of the father's strength; therefore the privilege was personal, and went only to the eldest. * So if a man had issue *A.* and *B.* *A.* had issue *C.* and *D.* and *A.* had died; *C.* and *D.* should have the double portion of their father, but *C.* had no greater share of it than *D.* nor did the double portion ever prevail, where the descent was to brothers and other collaterals.

Selden de
successione.
apud Hebræ-
os, c. 23.

* If a man had no sons, his daughters inherited; but without double portion to the

* This right of representation is not peculiar to the law of *England*, but is observed by the laws of most countries; and we read in *Numbers*, ch. xxvi. ver. 33. and ch. xxxvi. that when *Zelophehad* the son of *Hepher* died, leaving no sons, but daughters, they came unto *Moses*, and claimed the possession of their father. This being a new case, *Moses*, it is said, brought that case before the Lord, who commanded him to give unto them the possession of their father. So that it was here determined that they should take the double portion belonging to their

the eldest; but they were obliged to marry among the families of the tribes, that the inheritance might keep among the same families.

If a man had no descendants, it went to the *agnati* or kindred of the father's side, and it never went to the *cognati* or kindred of the mother's side, because the father gave the denomination to the families.

If a man died intestate, his acquisitions went first to descendants, then to his father, as nearest relation; then to brothers as representatives to his father; only they had a law, that if a brother married the deceased's wife, and had issue, such issue bore the name of the deceased, and had the inheritance, exclusive of all others.

their father, as the eldest son, by right of representation. And this right of representation was practised among the *Romans*, and was the law of the twelve tables. *Selden de success. apud Hebræos*, c. 23. And this right of representation holds in inheritances descendible by custom, as well as by common law, as in the case of gavelkind lands, borough *English*, &c. and there is a remarkable case adjudged in the *C. B.* in my Lord *Bridgman's* time, anno 1660, 1661. and entered *Hil.* 1655. *rot.* 779. between *Hale* and ———; but it was never printed until my Lord *Raymond's* time. See Lord *Raymond's Rep.* 1025, 1026, &c.

If the deceased had neither father nor mother, it went to the grandfather, and to the uncles and nephews, as his representatives, and for failure there, to the great grandfather and his representatives *in infinitum* in the same order.

Numb. xxvii. As to inheritance, that went to descen-
from 1 to 11. dants, and then to collaterals; for that
must have passed the ascending line before

Lev. xxv. it could have settled in the descendants;
ver. 8. to 14. so that *Moses*, when he speaks of the laws
The Agrarian of inheritance, doth not mention the fa-
law among the ther, because he must have had it before
Romans was, to divide the
lands got by it could come to the son.
conquest a-
mong the sol-
diers equally,
&c.

As a man could not devise the inheritance, so he could not sell, but from the time of sale to the general jubilee, which was once in fifty years; then there was a rotation of all possession, and every man was instated in his own, which was the *Jewish Agrarian law*. See *Hale's Success.*
5 to 11.

The *Roman* law differed from the *Jewish* in that the father had the power of life and death over his children without the magistrate, so that he might destroy his sons, which was frequent in the ancient *Roman* times; for they used to expose their issue, if they had more than they could keep. From hence began the right of adoption: for to preserve children

common law tenures.

7

dren from death, they were adopted into other families, and became children of that family to whom adopted. And as a *Roman* had power to destroy his children, so he might disinherit them by his will in express words. But if he only pre-terminated them, and gave them nothing, then the pretor introduced them to an equal portion with the rest. So that a *Roman* had an intire power over his children while he lived, and whatever they got was their father's, and at his death, he might dispose of it as he pleased among his other children. If he died without such disposition, it first went among those of his own family, whether male or female, by him begotten or adopted. If any of his sons died, the grandchildren succeeded into his portion *in stirpes*; but the pretor brought in children emancipated equal with the rest; for though such were out of their father's family, yet the natural relation continued; but if an adopted son was emancipated, he took nothing. The children of daughters did not inherit the father, because they were out of his family.

If a man had no *sui hæredes*, by the old *Roman* law it went to the *agnati*, as first to brothers as representatives of their fathers; to uncles *ex repræsentatione* of

their grandfathers, *in capita in infinitum*, after the *Jewish* model; but the pretor brought in the *cognati* in equal degrees *in capita in infinitum*, to inherit with the *agnati*. Because by the indefinite liberty of devising, they could not keep estates in their tribes; therefore the *cognati* entered in according to their natural relation.

A son emancipated, or a son that had acquired a *peculium*, after they had allowed that privilege to sons in the life of their fathers, on failure of issue was inherited first by the ascending line, and that failing, by the collateral, only brothers of the whole blood were called in *in capita* equal with parents and their children *in stirpes*; for such brothers being of both bloods, they were held equally dear as either parent. On failure of the ascending line, and brothers and sisters of the whole blood, it went to brothers and sisters of the half blood, and their children *in stirpes*, by the *Justinian* constitution. On failure of them it went to those persons that were next in degree *in capita*; and those that were equally in degree inherited equally, as uncles on the father's and mother's side. And the next in degree excluded the more remote, as an uncle living excluded the son of an uncle.

uncle deceased; and the degrees were computed up to the common ancestor, and then down to the person to whom the relation was made: therefore uncles are of the third degree, uncles sons in the fourth degree. But things descended from the father descend to the degrees on the father's side, according to those rules, that things descended from the mother descended to the degrees of the mother's side, according to the same rules.

The 22 & 23 *Car. 2. c. 10.* has introduced this law into *England*, in relation to intestates estates. Only one third is to the wife, two thirds to the children, the heir at law taking equal with the rest: and the portion of a child preferred to come in average with the rest. For want of children the wife is to have one moiety, and the next of kin the other. If no wife, the father is to have the whole, as next of kin. But by the stat. 1 *Jac. 2. c. 17.* the mother is to inherit equally with brothers and sisters, and their representatives, according to *Justinian law*: and by the stat. of *Car. 2.* the succession is carried to brothers and sisters children *in stirpes*, according to civil-law, save only that no distinction is made between brothers and sisters of the whole and half blood; because the law speaks of brothers and

Of feudal 02

and sisters, children indefinitely, without distinction of bloods; and the spiritual courts had never distinguished the bloods, because the canon law, where the degrees of proximity were settled in relation to marriages, had made no such distinction. For want of brothers and sisters, and their children, next of kin succeed *in capita*, according to the afore-mentioned rules of civil law, where the next in degree succeed both on father's and mother's side, and excluded the more remote. But in our law the intestate is considered as the original proprietor in whom the estate is vested. So no distinction is taken between things coming from the father's or mother's side.

The feudal succession came in in this manner: * the lords gave lands to such persons as behaved themselves well in the war, for their lives only: sometimes they also married their daughters to them. Then by their feudal donations, they limited the lands to go not only to the feudary himself, but also to the issue of that marriage; and this brought in the notion of

* *Deinde statutum est ut usque ad vitam fidelis produceretur.* Feud. lib. i. tit. i.

Postea vero est ventum est, ut ad recipientis vitam produceretur. Hanne-ton de jure feud. 139.

succession

common law tenures.

I I

succession among the northern nations that invaded the *Roman* empire. The lands therefore in the elder times went to the immediate descendants of such marriage, and originally to none else: and first they went to males, as the most worthy of blood, and most capable of doing the services annexed to such donations; for want of males it went to females, as descendants of the same marriage. Lod. 114.
115, 116,
117.

* The feud was united in the eldest male, because he was obliged to do the duty in the wars; and for every knight's fee, was to go out forty days with his lord; so that the feud did not divide among the males, because the duty could not be divided commodiously. Because, secondly, the males were to keep up the grandeur of the family, therefore the inheritance was not shared nor broken. Hence it came to pass, that among the males the eldest was preferred as the most

* *Ordain fuit que fee de chevaler deviendroit al eigne firs per succession de heritage, & que socage fee fuit partable perenter les males infants.* Horn's Mirror des jus. lib. 1. c. 1. f. 3.

Proles fæminei sexus, vel ex fæmineo sexu descendens, ad successionem aspirare non potest, nisi ejus conditionis sit feudum, vel ex pacto acquisitum. Feud. lib. 2. tit. 2. f. 2. tit. 11, 30, 50, 104.

worthy,

Of feudal or

worthy, since he was soonest able to go to the wars, and do the duties of the tenure.

Spelm. Rem.
29.

The eldest son was anciently married with the consent and approbation of the lord; for the lord always approved the first marriage of his feudary and of his heir apparent; and if the feudary died, the heir within age, the lord had the total marriage of him; and if he was of full age, the lord gave licence to such marriage. Hence the descent always settled in the eldest line, and the daughter of the eldest son was preferred before the second or third brothers, and their male descendants, in order to encourage the best marriages with such eldest son; and this was the settled course of the * *feudum nobile*. Whence our law took the pattern for their military tenures, and the socage tenures, divided in *Saxon* times as † *feudum ignobile*, but afterwards came to imitate the military feud, in order to support their families.

The *feudum ignobile* was dividable among the sons.

If there were no sons the feud came to the daughters, who divided it, because by the donation it was to go to all the de-

* *Zafius in usus feud. fo. 5.*

† *Stry. exam. jur. feud. cap. 3. q. 36, 37.*

scendants;

Descendants; therefore the female descendants could not be excluded, and one of the daughters could not be preferred before the other, because none could do the service of the feud in their own persons, nor did any of them bear the name and dignity of the family. Therefore these were married by the lords among their tenants; so they kept the feuds in their several manors from being broken and divided; as if two daughters divided a knight's fee, the lords, by the marriage of such a daughter with one that had half a knight's fee, re-established the feuds of their tenants.

If in such feudal donations, the elder line had failed, it went back to the issue of the second son of the same stock, to whom the first donation was made; and to his descendants, because by the feudal donation it went to all the descendants of such marriage, and so the succession was established to the descendants of the same stock *in infinitum*, but could not go to any other relations but to such as were descendants of the stock to whom the donation was made.

In a long course of years these feudal donations were worn out, when it became impossible to compute up to the first feudal marriage when such donations were originally

originally settled; and then they inverted the computation, and computed from the last possessor, provided the heir that claimed was of the blood of the first purchaser; and then the rule was taken *quod seizina facit stirpem*; for since the feudal donation was lost, they could not regularly compute the descendants from the first feudal marriage; therefore they computed from the last feudary; and since both bloods of the first marriage were necessary to any person that would claim under the first donation, they required that a man should be of the whole blood of the last feudary that would claim as heir to him; for then of necessity he must be of both bloods of that remote feudal marriage, where the feud was originally placed. Thus half blood came to be excluded; because if it were admitted where feudal donation was lost, it might have carried it out of the line, where such donations were once settled; so that in such case they put the person, claiming as heir, to shew that it was an ancient feud, and that the party claiming was of the whole blood of the last possessor, which formed the utmost presumption of the right of succession, where the feudal donation was lost; which half blood did not do; because it was originally settled in both the bloods

common law tenures.

15

bloods of the first purchasers. Besides, lords had the marriage of the feudary; therefore all the issue of the second marriage were excluded from the immediate inheritance of the children of the first marriage, since the lord had not the marriage of the feudary more than once; and therefore they could not come in as issue of a second match; but all that claim the inheritance must make themselves heirs under the same feudal marriage from whence the last feudary descended, which half blood could not do. But where they can come in under any marriage presumed to be made by the feudal lord, they were admitted. Therefore a brother of the half blood was not heir to the brother, but might be heir to the uncle. Hence they formed the rule, *possessio fratris de feodo simplici facit sororem esse hæredem*. For when the old feudal donations came to be lost, the possession was the only *indiciu*m of who was feudary; therefore any person that claimed as his representative, must shew a descent from the same stock, and therefore the rule was taken as to lands in fee-simple, and not as to lands in tail. For there a man must claim as heir *per formam doni*, as they did in the old feudal donations *de feudis novis*; so of a remainder after an estate for life, that never fell in

in possession, a man must claim, by virtue of the contract, as heir to him to whom the remainder was limited; for no man in such case can make himself heir to the last feudary, since the feudal possession was in tenant for life. So of a reversion on an estate for life, upon which no rent was reserved; for a man must make himself heir to the last feudary before the estate for life was created; but if a rent had been reserved, it had been doubted whether he must make himself heir to the last possessor of the estate, or to him that last received the rent; and whether the receipt of rent make such a feudal possession as may be laid as esplees in a writ of right. Certain it is, that if a reversion be depending on an estate for years, the possession of the rent is a possession of the land itself; and the sister of the whole blood will be heir to the brother; and the brother of the half blood, that is heir to the father that made the lease, will have no title. There is *possessio fratris* of an advowson or rent, after actual receipt of rent or presentation of the clerk. So of an use, because equity followed the rule of the common law. So of a copyhold, where the eldest son receives the profits, and dies, though before admittance.

Co. Lit. 14.

15.

4 Rep. 21.

* After-

* Afterwards where the feud escheated to the lords for felony or want of heirs, the lords were wont to restore the feud to the old family, or grant it out again to another family *ut feudum antiquum*, and then the descents were formed in such new feud, as if it had been *feudum antiquum*. Hence the lineal succession, or succession of the father † was totally excluded, because no case could happen where the ascending line could be admitted *in feudis antiquis*; for the father took before the son, under the first feudary in every ancient feudal donation; and all above such donation were excluded, so that in no such donations could any father claim as heir to the son.

And this order of descent, that excluded the father, was the rather continued, because the father was guardian to the son; and in those barbarous times they would not trust the father with any profit from the death of his own issue, so that the father was totally excluded. *De feudis* 153 to 261. But a feud purchased by the son

* *Revertitur terra ad dominum capitalem, vel ad rectum dominum, scilicet ad ipsum de cujus feodo est.* Brañ. lib. 3. fo. 130. lib. 4. fo. 160. b.

† *Successionis feudi talis est natura, quod ascendentes non succedunt, verbi gratia, pater filio.* Feud. lib. 2. tit. 50, 84. . Lit. seq. 3.

right of representation to his feudary, and there was none of the ancient kindred on the father's side remaining; for then it must be supposed his intention, that it should descend as if it had been a maternal feud; for otherwise he would have limited it to the feudary for his life, or to the feudary and his issue, after the manner that was used in the limitation of new feuds.

Greg. lib. 4.
sect. 6.
2 Inst. 97.

Bastards, or children born out of wedlock, were totally excluded from all feudal succession, though their parents had afterwards intermarried, because the lords would not be served by any persons that had that stain on their legitimation, nor suffer such immoralities in their several clans; though the civil law admitted them as adopted by the subsequent marriage, and so the canon law, because the matrimony wiped off the precedent guilt.

Of descents which take away entries.

WHEN any man is disseised, the disseisor has only the naked possession, because the disseesee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have the right of possession; for in respect to the disseesee he has no right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseesee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir.

The notions of the law do make this title to him, that there may be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it is the law that gives him this right, and obliges him to these duties, antecedent to any act of his own, it must defend such possession from the act of any other person whatever, till such possession be evicted by judgment, which being also the act of law, may destroy the heir's title.

Of descents which

Lit. sect. 386,
387, 8, 9.

In the case of fee-tail, the possession is thrown upon the heir in tail, therefore the law constitutes the *jus possessionis* to be in him.

If a disseisor, at the time of his death, has not the freehold in him, it cannot be cast upon his heir; for then there is no danger that the freehold should want a possessor; therefore the law creates no title to such possession in the heir at law; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor. The law will not afterwards create him a new title, in prejudice of the person that has the right of propriety.

If the disseisor therefore makes a lease for life, he parts with the possession, and cannot transmit it to the heir, since he had parted with it at the time of his death, and the descent of a reversion will not make a right of possession; for nothing descends to the heir in reversion but the right of the reversion, and that is a right against all other persons but the disseisee. For since only the right descends, the heir can be in no better case than the disseisor was at the time of his death; and therefore when tenant for life dies, he has only the naked possession, as the disseisor had

had it. But if the disseisor had died in possession, the law, for the reason aforesaid, casting the possession on the heir, makes it a right; for that is properly a right which a man comes to by the act of the law; and since the heir in such case would come to the possession by the act of the law, it must be called a right of possession; and it could not be a right of possession, if he could not defend it against all aggressors; therefore in such case the right of entry is taken away from all others; and hence the distinction came to be made between *jus possessionis* and *jus proprietatis*.

A second reason why the descent creates a right of possession is, because the disseisee has not claimed during the life of the disseisor, and the right of *possession* is presumed to be derelict, if the party ceases to claim it, till the law for the necessary causes before-mentioned is obliged to cast it upon another; but the right of propriety is not presumed to be derelict, till the time allowed for the limitation of those actions be expired. So that *Coke* says, Anciently a feoffee that came in by title, though by his own act, after a year and a day, had a right of possession.

Spelm. Feud.
§ 1.

A third reason why descent gives a right of possession is, because originally the relief was in nature of a new purchase upon every descent; for then it did again fall into the lord's hands, till it was relieved out of his Hands by such payment.

Now for such payment they immediately distrained upon the possession as soon as ever the descent was cast; so that the heir was forced upon such payment, in preservation of his stock left on the ground by his ancestor; and being forced upon this purchase, it is fit he should enjoy the right of possession. But where a disseisor makes a lease for life, and dies, and the reversion descends on the son, if he enters after the death of tenant for life, he shall pay a relief; and yet such a descent shall not take away an entry, because it was his own fault he entered and stocked the land himself, and made himself subject to the relief; for then the buyer must beware, and take the title in the condition it was in at the death of the ancestor.

Fourthly, The right of possession is gotten by the descent, that it may be an encouragement to the tenant to be bold in war; for that none can enter and dispossess his children of the estate whereof he
dies

take away entries.

23

dies possessed; but if another doth the duties of the feud at his death, then it is not reason that such a descent should give a right of possession to his heir.

The escheat doth not take away the *Lit. sect. 390.* entry, because, though in respect of a stranger's *præcipe*, the law doth cast the freehold upon the lord, antecedent to his own act; yet the lord need not enter to take the profits and to do the duties, as the heir is obliged to do, but the lord may take the disseisee as his lawful tenant. And it is plain that the law doth not cast the freehold upon the lord in the same manner as it doth upon the heir, because the lord is obliged to answer the feudal duties to the lord paramount, in respect of his feigniory, whether this possession was cast on him or not; so that in this case there could be no failure of duty, though the lord doth not enter.

In the case of a feoffment upon condition, there is no distinction between the right of possession and the right of propriety, but both rights are in the feoffee till the condition broken, and entry for such breach; and afterwards both rights are in the feoffor; therefore the descent doth not take away the entry, since the possession and the propriety descends in the same manner, *viz.* under the condition *2 Inst. 286. Lit. sect. 391.*

tion that it was at first granted; and the possession is not cast upon the heir while the propriety is in some body else, as in the former cases; and it is the descent of a naked possession to an heir at law, that forms a *jus possessionis*, distinct and abstracted from the *jus proprietatis*. But here both rights are united at the time of the descent; and if the feoffor in this case could not assert his claim by an entry, he could have no remedy, either for his *jus possessionis* or *jus proprietatis*, which are not here separate or distinct; for till he enters to take advantage of the breach of the condition, both rights are in the feoffee, because the solemnity of the feoffment cannot be determined but by an act of equal notoriety; and because the possession and right are not here separate or distinct, it is called by a different name, viz. not a right, but a title of entry.

Lit. sect. 393.

4.

* The law doth not cast dower upon the wife, but she takes it by her own act; but

* We find no footsteps of dower in lands, until the time of the Normans. *Bacon's History of the Eng. gov.* 104, 146.

But amongst the laws of the Saxon King Edmund, cap. 51. we find a provision made for the support of the wife that survives her husband out of his goods only.

Nor

but when she is endowed, she is in from the death of her husband; therefore she has only the naked possession her husband had, not any *jus possessionis* at all; since it was not of absolute necessity she should claim her dower; but it is of absolute necessity that the law doth cast the freehold upon the heir. Now by the endowment the possession is avoided that the law cast upon the heir, because she, as is said, is in from the death of her husband, and by consequence there is no right of possession, as to this third part, acquired to the heir at law; since the law doth not place him in such third, after the death of the father; and though the reversion belongs to him after the death of the mother, yet that is only the reversion of that which the mother possessed, which was a naked possession; and so he has herein no right of possession at all.

Where the disseisor infeoffs the father, Lit. 395. it is presumed to be done in order afterwards to come in by descent, and the act of law shall not give sanction to the

Nor was there any dower in *Wales*, until it was annexed to the crown of *England*, as appears by *Stat. Walliæ*, viz. *Quia mulieres hæcenus non extiterant dotatae in Walliæ, rex concedit quod dotentur.*

wrong

Of descents which

wrong of the party; nor shall any man by his own wrong, however cunningly contrived, give to himself a right; for when the heir by the descent gains a *jus possessionis*, he is supposed innocent of the wrong of his ancestor; but here he is partner of the guilt.

Lit. sect. 396.

7.

When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possessions of the father in the family, that no body else abates. For since this is the most charitable interpretation that can be made of this action, and by such a construction it is just and rightful, the law shall not intend it to be a wrongful act or disseisin, and by consequence the possession of the younger brother becomes that of the elder brother: and then if there be not a possession distinct and separated from the right, the descent cannot make a right of possession distinct from the right of propriety; for it were incongruous that the ancestor should be construed to possess in another's right, in order to do no injury, and the heir should be construed to possess in his own right, in order to do injustice to the elder brother. Besides, no laches can be imputed to the elder brother, since the younger entered and possessed

seised for him. But if the younger brother in this case had made a feoffment in fee, and the feoffee had died seised, this descent had taken away the entry, because then the younger brother could not be interpreted to enter to preserve the estate of the elder, but in order to make the advantage of it for himself. So in the case *Co. Lit. fe. Litt. puts*, If the elder brother had entered, then if the younger had entered upon him, this had been in destruction of the elder brother's possession, and therefore the younger gets a possession distinct from that of the elder brother, and his heir a distinct right of possession, and it is the laches of the elder brother, that he did not enter to restore his possession.

If one coparcener enters into the whole, *Lit. fe. 398*: it is only in preservation of the estate of the other; but if she disseiseth the other after her entry, there she gets a possession distinct from that of her sister, and the descent will take away the entry, *causa qua supra*.

The issue of the bastard eigne not only *Lit. fe. 399*. gains a right of possession, but a right of *400. 1.* propriety by the enjoyment of his ancestor. Such issue are held legitimated by the civil law, because they are adopted by the marriage of the mother. So by the canon law, because the *matrimonium subsequens tollit reatum precedens*; but by the

Of descents which

the feudal law they were excluded, because such a stain was thought to continue from the crime of the parents, that they could not do the feudal service with honour to the feudal lords; therefore they were anciently excluded *nisi nominatim ad feuda legitimantur*. But by our law, if they had an uninterrupted enjoyment during life, the issue for ever inherited; for since there was no objection to their legitimatation, during their lives, the personal defect must die with their person, in as much as it were inhumanity to throw reproach on them after their decease; and having done the feudal duties without objection, the objection comes too late when the personal dishonour ceases, and to the next person in possession no reproach can arise.

If bastards could be any where alledged in the pedigree after the decease of the parties, there would be no end of contention concerning them, and genealogies would be rendered perfectly uncertain; for there being no established registry of genealogies in the feudal, as was in the *Jewish* law, they conceived that the greatest evidence that could be of the legitimatation of the ancestor, was the uninterrupted enjoyment, and the carrying the same by course of descent to the issue.

Hence

Hence they would not suffer this rule by any means to be shaken, lest all descents should be rendered precarious; but if any part of the rule fails, then the right of possession is only gotten by such descent, and not the right of propriety; as if the possession be once interrupted by the mulier, if the bastard eigne re-enters, this only gets the possession, and by such descent the issue only acquires a *ius possessionis*.

So if the bastard eigne leaves a child *in ventre sa mere*, this shall not inherit; for though there the ancestor had an uninterrupted possession, yet there was no descent.

But if the mulier abates, the issue of bastard eigne hath both right of possession and right of propriety, because of an uninterrupted possession, and descent complete, the law casting the freehold on the issue, before his entry, or before the mulier can abate. Nay, this rule is preferred to the privilege of infancy, so that if the mulier were an infant, yet the descent of the issue of the bastard eigne should bar such infant, because it is by the laws of descent that the infant himself inherits; and he himself could not claim, but by supposing that uninterrupted possession of his ancestors, and the consequent descent gives

Of descents which

gives him a right. But if the person in the principal case were not legitimated, by the ecclesiastical law, his entry gives him no title, but as another disseisor; for he is an absolute stranger by all laws, and reputed *nullius filius*.

Lit. fect. 402. As to infants, feme covert, persons
3. 4. 405. 6. *non compos*, the descent to the heir of the
Ld. Raym. 35. disseisor doth not take away their entry, because the infants, &c. had a right of possession, and the act of law cannot take away that right, since no laches can be imputed to them; since their negligence is not culpable, it were unjust to make market of their titles; and therefore the lord, when he takes a relief, is not supposed to transfer any *jus possessionis* to the heir of the disseisor, since the feud is not supposed, by negligence and want of a tenant, to fall into his hand, and from thence to be relieved to the heir of the disseisor, who hath title thereunto, since if that were doctrine, a negligence were supposed in these incapable persons, which the law doth not allow.

But the *non compos* in this case cannot alledge the disability in himself, because he cannot be supposed conscious of it; nor is he allowed ever at any time to alledge it: For when he is once *non compos*, there is no certain time when he can be

be adjudged to recover that disability, unless where he is legally committed, and then the acts during his lunacy will be set aside and discharged, and afterwards the commission superseded; for in no other way can the *non compos* be legally restored to his right, and to his capacity of acting.

If an infant disseises, this only gives Lit. sec. 407.
him a naked possession; for he has no 8.
privilege to do wrong; and if he alien in Strange 939.
fee, his alienation is voidable. If the alienee dies seised, he may enter; for though the descent gives a right of possession against the disseisee, yet it gains no right from the infant. If then the infant recovers, he is a disseisor as he was before, and being only in his former estate, he has no right of possession against the disseisee.

If a disseisor, that has only a right of Lit. sec. 409.
possession, makes a feoffment in fee on condition, and the feoffee dies seised, this gains a right of possession to the heir of the feoffee. But if the condition be broken, and the feoffor enters, he destroys the estate, and the right of possession annexed to it; and he being only a disseisor, is in his old estate, which is a naked possession, without any right at all.

Lit. sect. 410. A civil death, such as that of entering into religion, doth not take away an entry; for this seems to be the voluntary act of the ancestor, or rather a contrivance between ancestor and heir, to acquire the right of possession; and a man that hath done wrong, shall not by his own act acquire to himself a right.

Lit. sect. 411. A lease is a covenant real, that binds the possession of lands into whose hands soever afterwards they come, if the lands be not evicted by a superior title; but the termor has not the freehold in him, but holds the possession, as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Therefore if such termor be ousted, and the freeholder disseised, the disseisor has the naked possession bound by the covenant; and if afterwards a descent be cast, the heir of the disseisor has the right of possession, bound also by the covenant; for the heir of the disseisor has only the right of possession which was in the disseisee, and that was bound by that covenant, and therefore it must be bound by the same covenant in the hands of the heir of the disseisor; and were it otherwise, the right of the termor would be intirely destroyed, for he cannot have a right
of

take away entries.

35

of possession distinct from the right of propriety.

Now then, if the termor enters before *Ld. Raym.* the descent, he reverts the freehold in the ^{853.} disseisee, who has the right of possession; but if he enters after the descent, then he can only hold in the name of the freeholder who has the present right of possession, which is the heir of the disseisor.

In the times of domestick wars, when *Lit. sect. 412.* the courts of justice are not open, the descent gives no right of possession, though the disseisin was done in time of peace, For it were in vain for a disseisee to exert his right of possession, when the courts of justice are not open; nor can there be any such thing as the act of law to give a right of possession, when the law itself is silent; but in times of foreign war, when there is justice and peace at home, a descent will give a right of possession; for to encourage enterprizes in such war was such privilege given to the heir of the disseisor.

A succession doth not give a right of *Lit. sect. 413.* possession, as a descent doth; for a successor is in by his own act; for it is by his own concurrent act that he comes to be installed into the rights of his predecessor,

cessor, and therefore he can have no more than he had; but since the predecessor had a naked possession, and not the *jus possessionis*, the successor can have no more.

Co. Lit. 84. Besides, the successor pays no relief, unless by grant or prescription: for ecclesiastical lands were not relieved into the hands of the lord for want of a tenant, being given in free alms, or to do service by proxy; and since the lands are not relieved into the hands of the successor for a consideration paid, he doth not acquire a right of possession. Besides, there is no reason to encourage the predecessor to dare in war, who either went not at all, or else by proxy; and therefore no reason such succession should get a right of possession.

Of continual claim.

IF a man be disseised, and the disseisor Lit. 62. 414. die in peaceable possession, immediately after such disseisin the heir acquires 415. *jus possessionis*, if the disseisee suffered the ancestor quietly to enjoy; for then the presumptive right is in the heir; but if the disseisee has re-entered within a year and a day before such descent, then the heir doth not acquire the *jus possessionis*. First, because there is no laches in the disseisee, and the act of law would do wrong and injury (which it cannot do) if it should alter the right when the disseisee has done what in him lay to continue the right of possession. Secondly, because there is no presumption that the disseisor had right, if the disseisee continue the claim; for the law cannot presume the right of possession to be derelict, contrary to the manifest act of the disseisee. Thirdly, the lord ought not to take the heir for his tenant; and there is sufficient warning for the ancestor in his life-time not to do the voluntary service, nor for the heir after his decease to pay the relief.

Lit. sect. 416.

* If the vassal renounces the feud, this is a cause of forfeiture by the old feudal law, because it was saying they would not do the feudal services that were the perpetual consideration for such possession, nor keep within those restrictions required by the feudal contract, which were the original design of the gift. *Vassallus, si feudum vel feudi partem aut feudi conditionem ex certa scientia inficiatur, Et inde convictus fuerit, eo quod abnegavit feudum ejusq; conditionem, expoliabitur.* But when distresses were invented, then the land itself was not seized for neglect of services, because they had this method of compulsion. But if tenant for life had aliened in fee, there was no redress but by a seizure of the land itself; and therefore this cause of forfeiture in our law was restrained in the alienation of tenant for life.

Digest. Feud.
lib. 2. tit. 26.
fo. 523.

Ld. Raym.
120.

If tenant for life makes a feoffment, or levies a fine, it is palpably contrary to his oath of fidelity to the reversioner, and therefore that is a plain renunciation of the feud. So in the case of the remainder,

* *Revertitur terra ad dominum capitalem, vel ad rectum dominum, scilicet ad ipsum de cuius feodo est.* Glanvill. lib. 7. c. 17. p. 59.

Reascendit ad capitales dominos a quibus primo processit. Bracton. lib. 5. c. 6. fo. 375.

the

the estate for life is drowned in the fee; therefore the estate for life is renounced, and the remainder commences. So if tenant for life of a rent levies a fine, this is a forfeiture; for though the fine being of a rent, passes no more than it lawfully may; yet being a publick and solemn renunciation of the estate for life in a court of record, it is within the reason of the law, and amounts to a forfeiture, and the remainder man anciently was to claim within the year.

The entry is the same thing as the *ven-* Lit. sect. 417.
dicatio or *calumniā* in the civil or feudal 418.
law; and this entry was of equal solemnity with the feoffment: for as the feoff- Stra. 1086.
ment was anciently made on the land *co-* Ld. Raym.
ram paribus, who subscribed the feudal 779.
instrument in the *hīs testibus*; so it seems the entry was made upon the land, and afterwards the claim was recorded in the lord's court, and hence called *clameum*, or *calumniam apponere vel advocare*. Vid. Digest. Feud. lib. 2. tit. 8.

But afterwards they allowed the feoffment to be good, though it was attested *per extraneos*, and not *coram paribus*; and the entry was allowed to be good, if made upon the land, though it were not recorded *coram paribus*; but the manner of recording the claims of liberties before the

justices in eyre remained long after, as appears by the *Register* 19. *b.* which seems to be a continuance of the ancient practice. See *Spelm. Gloss.* tit. *Calumnia*, fo. 97. But when the feoffments were not attested by the *pares*, yet they were attested and tried by the *pares comitatus*; and therefore if the land lay in two counties, there must be livery in each of them: So if the land lies in two counties, the entry must be in each, because the attestation of both facts, if controverted, must be by the *pares comitatus*.

Ld. Raym.
166.

Lit. sect. 419,
490.

Livery within view, and entry afterwards, is equal to a livery on the land itself; and if a man cannot enter for fear of outrage, yet it is good; so also is a claim within view good, when a man fears to enter; for in both cases a man ought to take possession where he can, because it is the change of possession makes the notoriety in both cases. But if the disseisor menace war to the person that hath right, then the law, which doth not compel to impossibilities, allows him to make his claim as near the land as he durst come.

Lit. sect. 421,
2, 3, 4, 5.

The notion of the laches, in not claiming for a year and a day, is taken out of the feudal law; so is the express words of *Frederick*, touching the tenant's claim of his

Of continual claim.

41

his lands from his lord. *Præterea si quis infeudatus major quatuordecim annis sua incuria vel negligentia per annum & diem præterit, quod feudi investuram a proprio domino non petierit, transactio hoc spatio feudum amittat.* Digest. Feud. lib. 2. tit.

55. fo. 543. Vigelius 241, 255---478.

And the reason why this time of a year and a day seems to be set by the feudal law is, because the services appointed seem to be annually compleated; and therefore that was the time for the vassal to claim from his lord; and the same time that he had to claim from his lord, he had to claim from any disseisor for the uniformity of the law; and that the lord might know who was the person that he might take for his tenant, and that the lord might receive his feudal fruits from the heir, in case the disseisor died. And if the tenant lost the whole feud, in case he did not claim within a year and a day, it is fit he should lose the right of possession, in case he neglects his claim upon the disseisor in the same space, that the heir may be in peace, and that the lord may receive him as his tenant. For that was by the Ancients thought to be a violent presumption of dereliction, both in the one case and the other. But our law, since it gives a distress for all feudal duties, doth not presume the feud derelict,

in

Of continual claim.

in case feudal services are not paid, since the lord has a power to compel the payment; and therefore the law doth not induce any forfeiture in that case. But the law gives the right of possession to the heir, in case the disseisee doth not claim within the space mentioned, because there the presumption remains of the dereliction of the disseisee, since the entry or action is the only way that he has to obtain possession. But if the disseisee enters within a year and a day before the descent cast, though there were twenty mean disseisins, yet the entry is not taken away; for there can be no *jus possessionis* in the heir, if the disseisee has continued the possession by those solemn acts that the law requires, and within the time that the law builds a presumption of a dereliction, if the disseisee neglects his entry. But if the disseisor at common law had kept possession forty years, and the disseisee had entered but half a year before his death, yet in that law, as *Litt.* remarks, the heir had not gained the right of possession, because no dereliction can be presumed, if the disseisee claims within the time prescribed by the law. And if the law cannot presume that the disseisee has deserted the right of possession, it cannot be transferred to the heir of the disseisor; nor ought the

the lord, in such cases, to accept of his services from such heirs. Nay, *Coke* says that the feoffee of the disseisor that comes in by title after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because they come in by title; and for quiet of purchasers, this non-claim for a year and a day was held a dereliction. Hence writs of entry against the feoffee in the *per & cui*. But this was not held so in respect of disseisors, because they themselves being the wrong doers, had no law in their favours, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession, and therefore they construed the feoffee that came in by his own act, to be a wrong doer, and not to alter the right of possession; but the heir, for the reasons aforesaid, was left as before.

If the disseisor dies seised within a year Lit. sect. 426. and a day after the disseisin, and before any entry by the disseisee, this gives a right of possession to the heir, because when the disseisee yields up the possession peaceably, the presumptive right is in the disseisor; for it is to be presumed that the
disseisee

disseisee would return again to his possession, if he were not conscious that his adversary had the right; wherefore there is no time given after such disseisin, for the disseisee to assert his right; for it is to be presumed he would do it immediately, if he has the right of possession in him, and the rather, for that men have the quickest sense of injuries immediately after they are committed. So that the giving up the possession tamely, and yielding to the disseisin, makes a strong presumption for the disseisor's right, and by consequence the law must take the right of possession to be in the heir of the disseisor, and the lord is bound to accept him as tenant, and to relieve the tenements into his hands. But if the disseisee had re-entered, then he had asserted his own right of possession by such his entry; for *affectio imponit nomen operi*; for the law cannot suppose the disseisee to have relinquished his right against his own express act to the contrary. And if the disseisee has not deserted his right, the lord ought to attend to the solemn claim made by him, and not relieve the tenements into the hands of the heir of the disseisor; and if he doth, it is null and void, and cannot give him any right.

If

Of continual claim.

45

If a man be disseised, he may have an action of trespass against such disseisor for the act of entry, because the disseisee being in actual possession, and taking the profits, violently to enter and take them away must be a transgression, and the destruction of a man's goods and chattels is punished in this action. But after such disseisin he can have no trespass for the mean profits, for the mean profits follow the possession; and the person that resides in the feud is intitled to all the profits of it; because the burthen of the feudal duties is laid on him while in possession, in defence of his stock on the ground; but when the disseisee enters, the disseisor is a trespasser *ab initio*; for from the time of his entry the disseisee is in of his old title, and seated in his rightful feud as he was before; and therefore for all the intermediate time it was a violation done to the profits of his feud, since it was originally so, and he is in as from the beginning.

Lit. Sect. 430.
Ld. Raym. 62.

11 Co. 51.
Co. Lit. 257.
19 H. 6.
27. 8. 9.
2 Rol. Abr.
550.
Stra. 596.

If a man has the frank tenement in law in him, yet he shall not have an action of trespass before entry; as the heir shall not have an action of trespass against the abator before entry; for the possession of the heir cannot be abated before he is actually possessed; for no man can be said actually to enter, till the actual possession

Ld. Raym.
229, 476.

is in him, and no man can be a trespasser to that possession the law casts upon him, which is only a possession *de jure*, and is not capable of an actual violence. Besides, no chattels by our law can descend, and therefore he has a right to the grass upon the ground only as it is part of the freehold; and since he never entered on the ground till the chattels are severed, he can have no right to them at all, because he cannot shew that the possession of them was ever in him, or any person from whom he can claim them; and therefore no violation can be done to such possession by taking them away. But if a man be disseised, and his entry be taken away, he can never recover the mean profits; for then the right of possession is out of him. The heir of the disseisor is feudary to the lord, and has a lawful possession, and the disseisee can never re-enter to make him a disseisor; and if the disseisee has no right to enter on such possession, he can have no right to the profits of such possession, but the right is in the heir to undergo the duties of the feud. But if a man were disseised, and the disseisor made a feoffment in fee, and afterwards the disseisee had entered, he might have had an action of trespass against the feoffee, because this is a continuation of the same violence

2 Rol. Abr.

553.

19 H. 6. 28.

2 Rol. Abr.

550.

violence to the issues and profits that belong to him, that was first begun by the disseisor. *Gro. Eliz.* 540. *Mo.* 461. 2 *Rol. Abr.* 554. *Licet* 10 *Co.* 51. 1 *And.* 352. *Hob.* 98. 1 *Rol. Rep.* 101. *Godb.* 388. are to the contrary. It seems not doubted that the old law was otherwise, of which I shall deduce a brief history.

In *Saxon* times the right of propriety seems to have been only recoverable by a writ of right, as the right of possession was recovered by a writ of entry; and Sir *William Herle* himself tells us, that the particular writ of entry of *cui in vita* was not anciently known, but they recovered in that case in a writ of right. 5 *Ed.* 3. 58. 2 *Inst.* 343. The process in both these actions were alike, viz. by summons, *grand cape* before appearance, and by *petit cape* afterwards. But the battail was in the writ of right, where the property was doubtful; but in matters of plain and obvious right, as were those of possession, they did not appeal to providence. And it is to be noted, that the process and proceedings in those actions were not then so tedious, where the courts were held from three weeks to three weeks, and the process issued at every court day. But after the conquest, all causes were drawn into the king's courts to create the
greater

greater dependance; and then the process issuing from term to term was found very dilatory. Hence the assise was invented to do justice to the people in their proper counties, by the king's judges, and to determine the matter at once. From thence it is said by *Glanvil*, *Bracton* and *Fleta*, to be a new-invented remedy. *Glanv. lib. 2. c. 7.* *Fleta* 214, 215. And that it was of *Norman* original, appears by the *Customier* 16. b. But the writ of entry retained its old process, and therefore fell into disuse, as brought against the disseisor himself; and when it became thus obsolete, the writ was called a writ of entry, in the nature of an assise, as though that had been the elder action; or rather because both being of the same kind, the assise was a bar to the writ of entry, & *vice versa*; for both, as brought against the disseisor, supposed a right of entry in the disseisee, and no action could be brought above once by the law for the same thing; wherefore one action was given once only for the right of possession, and once for the right of propriety. But a man might bring one action for his own right, and another for his ancestor's right; for such rights of possession were distinct and different the one from the other.

1 *Ld. Raym.* 273. When the feud became farther to be considered

6 *Co.* 7. b.

sidered as a civil right, from henceforth it was not thought necessary that the feudary should cast himself on providence, and defend his military possession by battail. Then it was thought fit to make a change in the action; and for three descents and three alienations a man was allowed his writ of entry; because the disseisee, being the rightful proprietor, should not be forced to a combate; but after three descents it was thought that more than half the right was paid for by fines and reliefs to the feudal lord; and therefore the disseisee was put to his writ of right, to assert his right of propriety; and every body knows that the writ of entry ^{2 Inst. 153.} in the *post* came in by the stat. *Marlb.* c. 30.

Whether the other emendations in these ^{2 Inst. 248.} actions were made by the justiciar, chancellor or parliament, is uncertain, but no damages were recovered but against the disseisor himself, either by assise or writ of entry, till the stat. *Glocest.* c. 1. because the disseisor received the purchase money, and ought to answer the damages, and because the feoffee came in as an innocent man, and paid his fine to the lord, and even came in in default of the disseisee himself, he not preventing it but by his entry; therefore no damages were allowed till the said statute.

E

When

Of continual claim.

When the fines for alienation were wore out; and they found the prejudices of secret feoffments, which were made anciently, as is said, to acquire a right of possession; and before that statute to excuse damages. 2 *Inst.* 284. *Hob.* 48!

And here it is to be known that the disseisor hath the naked possession. The feoffee has a colourable possession coming by title, and the heir has the right of possession. The reason why the feoffee's title was formerly allowed; though he came in by wrong, is, because he anciently paid a fine to the lord; and therefore anciently, if he continued in possession a year after such purchase, the feoffee of the disseisor gained the right of possession: the history whereof will be proper here.

* By the ancient feudal law, no man could alien without a licence from the lord of the fee; and this licence was part of the notoriety on such alienations. And if they alienated without such licence; the feud was forfeited. Nor could the lords part with their manors and services without

Ex jure feudali non minus dominus prohibetur ab alienatione sui domini directe sine consensu sui vassalli, quam vassallus ab alienatione feudi, & utroque casu periturus, pena & hic & ille punitur, ille amissione directe domini, hic, utilis. Feud. lib. 1. tit. 22.

the

Of continual claim.

51

the attornment of their tenants, lest they should subject them to their neighbouring lords; between whom there might be a deadly enmity, which quarrel might be made up between the two lords, but might subject the feudary to the mercy of the alienee. That this was the ancient law touching the feud, is plain from all the ancient accounts of this matter. *Vide Virgilius at large, lib. 5. cau. 34. fo. 288.*

But in *England*, where the allodial property had very much prevailed in the *Saxon* times, they soon revived the free liberty of the alienations without fine, in three cases. First, in *remunerationem servitii*, viz. for services done to the feud, as for serving in the wars by the feudal tenant, or in plowing the feud at home, both these being either for the honour or profit of the feudal lord, they formerly valuing themselves upon the number and honour of their tenants. Secondly, in free marriage with the daughter of the feudary, or some other of his blood; and this was allowed without fine, because the feud was given in fee to provide for relations, and multiplied tenants to the lord. Thirdly, in free alms, the superstition of the times allowing it for the good of the soul; of which see *Glanv. lib. 7. c. 1. fo. 44. Stamsf. Prærog. fo. 27, 28.* But in all

Mag. Char.
c. 34.

these cases the alienation was to hold of the feudary, and he was to leave sufficient to answer the feudal services; and this privilege was confirmed by act of parliament, and made more general; so that the feudary might alien to whom ever he pleased, so that sufficient was left to answer the lord's services; and this seems to be a privilege mightily contended for; though after it was found inconvenient that the tenure should be of the feudary; and therefore was altered by the statute of *Quia emptores*; but the king not being particularly named, the tenants *in capite* were held to be out of the statute; and therefore by the statute *Prærog. Regis*, c. 12. it was settled that such tenants should not forfeit their lands for such alienations, but should be levied by process out of chancery; so that it is plain that formerly such fines were paid in case of every private lord; but the attornment continued, of which hereafter; and *vide Stamf.* 27, 28, 29. 9 *Ed.* 3. 29.

Ld. Raym.
862.

Where the maxim was delivered by *Wilby*, that the service of one man's body cannot be changed into another man's body without the assent of the lord of the fee.

Of releases.

WHEN a disseisin is committed, Lit. sec. 444. the possession and right is separated; but they may by a lawful conveyance be again united. Now when a man has the right and possession in him, he must convey by feoffment, which made a notoriety among the tenants, by the feoffment *coram paribus*. When a man was out of possession, he might convey by release only; for the disseisor had the possession, which of itself made the notoriety, and the release transferred the right; so that a release is a conveyance of right to a person in possession; and this comes instead of a feoffment; for a man cannot be put in possession, which is the operation of the feoffment, when he is in possession before.

A release of all a man's right supposeth Lit. sec. 446. that he has right, for he cannot transfer Ld. Raym. 786. a right which he has not; for if he has Ld. Raym. 1306. nothing, nothing can pass by the conveyance; and they thought it countenanced maintenance to transfer possibilities. But if the heir releases with warranty, it bars him when the right descends; for the warranty is a covenant for the defence

Of releases.

of lands by a man's own act made equal to a feudal contract, and therefore repelled the party himself or his heirs from claiming it, since he was bound to defend it to another; of which see *Hale's Succes.* 57. and tit. *Warranty*. But though a man cannot transfer a right that has no being, as he cannot release to the bail before judgment, or to the consor of a stat. all his right in the land before execution; yet when that which was esteemed a possibility takes the being of a right, as the remainder of a term of five hundred years, it may be released, because the notion of the possibility has vanished by the certain establishment of the term, 10 Co. *Lempert's case*, 47, 48.

Lit. sect. 447.
8.

A man cannot release but to the tenant of the freehold; for the presumptive right is in the freeholder (though he comes in by disseisin) during his possession; and the lessee for years takes and retains the possession but as his bailiff; and since the action and entry is only on the freeholder, he only is capable of a release, and the lessee for years is a stranger. But if a man has a freehold in law I may release; for then the law casts the possession upon upon him, and he has the presumptive right. *vide post. sect.* 510.

Of releases.

55

Releases are fourfold, either enuring by way of *mettre le droit*, extinguishment, enlargement of estate, and *mettre le estate*. Lit. sect. 449.
450. 1, 2, 3.
First, by way of *mettre le droit*, and this either to the disseisor himself, or to the feoffee coming in by title, or to the heir of the disseisor. Where a man releases to the disseisor himself, it alters the right; but where to the feoffee, it does not alter his title; for the disseisor coming in by wrong, the possession is only in him, and there is no notorious title, but only the bare possession; and therefore a release makes good that possession, by making of it rightful. But the feoffee comes in by title, and therefore the release cannot alter the title; for the feoffment being a notorious act, must be defeated by an act of equal notoriety, before any alteration can be made in such title. Therefore if there be two disseisors, and the disseisee release to one of them, he shall hold out his companion, because the disseisor comes in by no lawful or established act of notoriety, which ought to be defeated before the manner of possessing can be altered; and therefore though he possessed as a joint-tenant before the release, yet after the release he shall oust his companion, because he was possessed of the whole before by wrong, and now being possessed

Of releases.

by right, it follows that the possession of the other wrong doer is no possession at all. But if a disseisor had infeoffed two, the release of the disseisee to one should enure to both, because coming in by the legal notoriety of a feoffment, that must be defeated by an act of equal notoriety, before the title can be altered, because the feoffment must stand good, as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears that the freehold is in another.

Now since the freehold is not defeated in this case, the feoffment continues, and the release enures to them both. Another reason given by the Lord *Coke* is, that they may have opportunity to take advantage of their warranty, which will happen if they be defeated by action or entry; for then if the disseisor refuses to give a plea in *warrantia chartæ*, they shall recover in recompence, which could not be practised, if the feoffment were defeated by the secret operation of the release. By the same rule of reason, where a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life; or to the remainder-man, this enures to them both; because coming in by feudal conveyance, it cannot be altered, unless

unless it were defeated by an act of equal notoriety.

If a disseisor makes a lease for life, and the disseisee releases to tenant for life, this shall enure to him in reversion, because the release cannot alter the estate that passed by the feodal seoffment, without some act of notoriety by which that seoffment is destroyed; so if there be two disseisors, and they make a lease for life, and the disseisee releases to tenant for life, this shall enure to them all, because the release cannot alter the feodal seoffment.

If there be tenant for life, the remain- Co. Lit. 276.
der in fee and tenant for life is disseised by two, and he releases to one of them, he shall not hold out his companion; for if he had a rightful estate for life by the release, then the remainder would be re-vested: but the remainder cannot re-vest without some act of notoriety; for where there is a notorious possession by wrong, that may receive a release of the right, without any act of notoriety, because the possession is in itself a notoriety, but the estate cannot alter without some act of notoriety, so that men may know in whom the fee is lodged; and therefore one of the disseisors doth not take an estate for life, and re-vest the remainder;
for

for he to whom the release is made hath a longer estate than the releasor; and so should he be tenant for life, the release would enure by way of grant of his estate. So if the remainder-man had released to one of the disseisors, he should not hold out his companion; for if the releasor might hold out his companion, the estate for life gained by wrong would be left in both, during the life of tenant for life, since the remainder-man could not by his entry overthrow it during the continuance of the estate for life; and whatever right is acquired during the continuance of the unlawful possession, is acquired to them both: for if one were to acquire the whole right in remainder, there would be no notoriety of the beginning or determination of the estate for life in the other disseisor. But if tenant for life, and he in remainder, join in a release to one disseisor, he shall hold out his companion, because when the possession is notoriously in them both, each of them are capable of a release; and when one has obtained a release, it makes his possession rightful; and his holding out his companion makes it immediately notorious, that the estate is in him alone. Nay, if the disseisors make a lease for years, and the disseisor releases to one of them,

them, this shall enure to them both, because he cannot make it notorious that the estate is in him alone, because he cannot hold out his companion during the continuance of the lease for years. So if two joint-tenants are disseised by two, and one releases to one of them, he shall not hold out his companion, because he cannot hold him out of the whole, because he has not the whole right; and so there can be no act of notoriety, whereby the estate may appear to be in one disseisor.

If the king's tenant for life be disseised by two, and releases to one of them, this enures to both, because he can only be disseised of an estate for life, since the reversion in the king cannot be divested: ^{Co. Lit. 275.} ^{276.} If there be tenant for life, remainder for life, remainder in fee, and he in remainder for life disseises the first tenant for life, and the first tenant for life dies, the disseisin is merged; for since it appears by the notoriety of the feudal contract, that he is in his remainder for life, it must follow that he cannot be to himself a disseisor of such remainder; and if he cannot divest the remainder, the disseisin must cease with the possession of the first tenant for life.

Co. Lit. 276. *Littleton* also says in these sections, that if there be tenant for life, the remainder in fee, and they are disseised, the tenant for life cannot release to him in remainder, because the naked right cannot be transferred. Having considered how this release shall operate, as to the disseisor himself and his feoffee, the third thing to be considered is, how it shall operate as to the heir of the disseisor.

The disseisor has the bare possession, and the feoffee has the bare possession, but he hath it by title, and therefore the release to *them* serves instead of the delivery of the possession by feoffment; but such release passes the right of possession as well as the right of propriety; but the heir of the disseisor has the right of possession in him; therefore the release of the disseisee only passes the right of propriety. If therefore the heir of the disseisor be disseised, and the disseisee releases to such disseisor, and after the heir recovers against such disseisor, the right of propriety goes along with it, because when the heir recovers, he defeats the possession of the disseisor, as if it had never been, and then can he never recover in any action; for in the writ of right he must lay the possession in himself, or some of his ancestors; and this he cannot do in this case, for
here

here never was any possession in him, but what was totally defeated and destroyed; and he cannot recover by the old possession of the disseisee; for that was turned into a naked right, which could not be transferred but to a real and true possession; and here being no possession but such as stands defeated, it is the conveyance of a naked right, which cannot be; and were it allowed, would be a particular cause of maintenance in these cases.

But if donee in tail discontinue in fee, the reversion in the donor is turned into a right: now, if the donor releases to the discontinuee, and the tenant in tail dies, and the issue in tail recover against the discontinuee, yet he leaves the reversion in the discontinuee of necessity; for the issue in tail can recover but an estate-tail; and as the donor might have granted the reversion while the tenant in tail was in possession, so he may release it to the discontinuee, who has the right of possession. But disseisee enters upon the heir of disseisor, and incloses *A.* and the heir recovers against *A.* he hath gained the right of propriety; for *A.* cannot recover back against him, *causa qua supra*. But if the disseisee disseise the heir of the disseisor, this doth not get the right of possession;

feifion; but if the heir recovers the right of poffeffion, it leaves the right of propriety in him as before; for there is no reason, in this cafe, the right of propriety fhould be carried along with it: for fince the right remains in him unmoved, and not transferred over to any perfon, he can recover by virtue of the old feifin, that was lawfully in him, though this new wrongful poffeffion be defeated and destroyed. Therefore alfo if the heir of a diffeifor be diffeifed, and the fecond diffeifor infeoffs the heir apparent of the diffeifee at full age, and the diffeifor dies, and then the heir of the diffeifor recovers againft the heir of the diffeifor, yet the right of propriety continues, becaufe though the new and wrongful poffeffion be defeated, yet he may recover the right of propriety by force of the ancient rightfull feifin that was in his anceffor.

If the heir of the diffeifor be diffeifed, and the diffeifor releases to the diffeifor, upon condition, and the condition be broken, this reverts the naked right in the diffeifor. Becaufe when the condition is broken, the release is as if it had never been, and therefore the diffeifor may recover by virtue of his ancient feifin.

If disseise disseise the heir of the disseiser; and make a feoffment in fee, on condition, if the heir enter before the condition broken, the right of the disseisee is gone for ever; for when the feoffment estate that passed by the feoffment is defeated, the condition thereunto annexed is destroyed, and is incapable of being performed or broken; and the right can never revert in the disseisee, but upon breach of the condition, which is now become impossible; therefore the right can never revert in him at all, and therefore he can never recover by virtue of his old feisin; and the feoffee cannot recover; *causa quæ supra*. But if the condition had been broken, and the disseisee had entered, the old right had been reverted; and if the heir had entered upon him, he might have recovered by virtue of his ancient feisin. Co. Lit. 266.

Secondly, Of releases that enure by way of extinguishment.

If a man be disseised, yet he remains tenant in right to the lord; but the disseiser is the apparent tenant in possession; and the lord may, if he pleases, still avow upon his rightful tenant; for before the statute of *Quia Emptores*, the lord was not obliged

9 Co. 21.

obliged to change the body of his tenant. *Stamf. Prærog.* 28. and now he is not obliged to change his tenant, but in case of lawful feoffments, and tender of arrears, and not in the case of a disseisin. Therefore if a man be disseised, and the disseisee puts on his beasts upon the land, and the lord takes them for rent arrear, the disseisee shall compel him to avow upon him; and if the lord avows upon the disseisor as his tenant, the disseisee shall reply, and shew the especial matter, how he was tenant and was disseised, and shall abate the lord's avowry, because the feudal contract has still a continuance between the lord and tenant, and the wrongful act of the disseisor shall not destroy it; but if the tenant be disseised, and the lord accept rent from the disseisor, and then the lord distrains his beasts for rent in arrear, he may compel the lord to avow upon him, because he may plead that any stranger infeoffed him, and that the lord accepted rent; and the lord cannot, contrary to his own acceptance, traverse the title that he has admitted by such acceptance. But what if after such acceptance the disseisee should put in his beasts, and the lord should distrain them, can the disseisee compel him to avow upon him? *Coke* is of opinion that he cannot,

cannot; because it is the tenant's own laches he let the disseisor continue till rent was thus due and accepted; but the opinion of the 48 *Ed.* 3. 9. seems to be contrary, and that he must avow upon the disseisee, because when the tenant pleads the disseisin, to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. *Quære*, and see the book of *Ed.* 3. For after acceptance, whosoever beafts he take, by the book he seems to be obliged to avow upon them to maintain his distress. *Co. Lit.* 268. 20 *H.* 6. 41 *Ed.* 3. 2 *a.* 2 *Ed.* 4. 6. but very plain it is, that before acceptance he shall be compelled to avow upon the disseisee, if he puts in his beafts, and the disseisor cannot compel him to avow upon him, though he takes his beafts on the premises. So in the case of wardship or escheat. He may take either heir or either title before acceptance, but after acceptance he cannot enter for the escheat of the disseisee's right, because he has taken another tenant. It is also plain, that if the disseisor dies seised, the heir of the disseisor comes in by title, and then the disseisee cannot compel him to avow upon him;

him; for he has lost the right of possession, and the disseisee cannot put his beasts upon the ground, and therefore cannot compel the lord to avow upon him; and therefore the lord must take the heir who has such right of possession, to be his rightful tenant; but because the disseisee may enter and occupy the land before the descent cast, therefore the lord may release to him, and discharge the contract, which is to his benefit, and is still so far subsisting, that he may take advantage of it. So where donee in tail releases to the disfeisor all his right, yet if he in the reversion releases to him afterwards, it shall extinguish the rent. So where tenant in tail makes a feoffment in fee, though the tail be discontinued, because the statute that forbids alienation continues the relation of lord and tenant, notwithstanding the alienation. But if there be lord and very tenant, and the tenant makes a feoffment in fee, and afterwards the lord releases, this release extinguishes nothing; for the feudal relation is not subsisting after alienation, and the feoffor only of necessity becomes tenant in the avowry till the lord procures his arrears. If there be tenant for life, remainder in fee, and they are disseised, and the remainder-man releases

releases to tenant for life, this release passes no right, as is said, because the remainder-man is out of possession, and such a right cannot be transferred, but it serves to extinguish the right; for he may extinguish the benefit that accrues to him by the feudal contract. *Co. 1 Rep.* It is here to be noted, that before the statute of *Quia emptores*, if a man had aliened, the feud was forfeited, but afterwards that was compounded for fines; but the lord could then only demand a certain composition; and because the tenant had sworn fealty, he could not withdraw himself out of the feudal service during life, but after the death of the feoffor, the lord was enforced to take the feoffee for his tenant; for the lord could not introduce the heir into the feud, contrary to the alienation of the ancestor. And after the statute of *Quia emptores*, the lord could avow upon the feoffor till the arrears were tendered; but both before and after the statute, by acceptance of the feoffee, he became his tenant; for it is a plain consent to the alienation. So in Terms; if a termor assigns, and the landlord accepts rent from the assignee, he can have no action from the termor, because the rent is a service, which being taken from the

F 2
assignee,

Of releases.

assignee, establishes him in the term, and he cannot demand the service but from the tenant of the land; but where there is no such acceptance, if the termor assigns in his life-time, or the executor after his decease, yet an action of debt lies for the rent against the executor; for a term for years being the smallest estate, is presumed to continue in person, and the contract is supposed to be performed by that person, unless he accept another tenant; and that person has a continuance to perform all contracts as long as there is an executor that represents him, and has assets to perform his contracts. 5 Co. 24. 1 Sid. 266. But a man may have an action of covenant on the covenants in the lease, after the acceptance of the assignee for his tenant; because though the acceptance discharges the tenant from the action of debt, because it discharges the service by accepting another, yet without legal words and a solemn contract in writing, the covenant cannot be discharged; for *Solvetur eo ligamine quo ligatum est.* Cro. Jac. 309, 522. Cro. Car. 188. 465, 6, 7, 8, 9, 470.

Thirdly,

Thirdly, Of releases that enure by way of enlargement of the estate.

And here it is to be known that all feudal estates passed, as is said, by feoffment, where the contract was solemnly made *coram paribus* with the utmost notoriety, that all persons that had right might have the utmost notice against whom to bring their actions: but when the feud came to be inheritable, then it was necessary that there should be conveyances to pass the estate, where the feudary had parted with the possession for a limited time; as also for the lord to pass the services of his feudal tenants. Now this could not be by feoffment, because such persons had not the possession to transfer. Consequently it was necessary that they should pass by grant, where the parties had the utmost notoriety that the matter was capable of, which anciently made a notoriety three ways. First, by attornment or consent of the tenant, which was required, lest the lord that had often deadly feuds with his neighbouring clans, should compound the matter by the alienations of some of the feudaries, who might be forced into the fealty of another lord, with whom they had anciently con-

F 3

tended.

Of releases.

tended. Secondly, the notoriety was made by the payment of services, which being anciently corporeal, it was easily seen who was the feudal lord, because the military tenants attended the lord in person in the wars, and the socage tenants plowed and manured the lord's grounds; so that when granted it was easily seen where the service was paid. Thirdly, a notorious possession; the estate of which may be enlarged. Fourthly, by fines for alienation, which gave notoriety to such contracts, which grew obsolete by alienations to hold part of the feud; and afterwards by the statute of *quia emptores*, that gave power at all times to alien, holding of the superior lord; but the former causes of notoriety still continue. Now a release to the particular tenant from the lord from whom he holds, is equal to a grant and attornment, for the services go over to the superior lord, and there needs no attornment; for the tenant's accepting the grant is an attornment, and acceptance and consent is presumed to a grant made to himself, unless the contrary appears.

If *A.* makes a lease for life, and lessee for life makes a lease for years, *A.* releases to the lessee for years, and his heirs, this is void, because here is not the consent of the tenant for life, who is immediate tenant

Of releases.

75

nant to the reversioner, and ought to attorn, and therefore this estate ought to pass by grant and attornment: so it is if a man leases for twenty years, and the lessee assigns for ten years; but if a man makes a lease for years, the remainder for life, and afterwards releases to the tenant for years, this is good, because the tenant for years holds of the reversioner, and pays him the services, and ought to attorn to his grants, and not be in the remainder for life; and therefore where tenant for years accepts a release of the reversion, it must in consequence be good; but in that case a release to him in the remainder for life is good, because the lessee, in the original infeudation, took the estate for years, subject to such remainder for life, and therefore there needs no consent from the lessee for years, to enlarge the estate into a fee. But a man must not only have an immediate relation, but he must have the notorious possession of the estate, as tenant for life has by the feudal contract; for if he hath not the possession, but has assigned it over to another, there can be no such notorious possession upon which a release should enure; for it would destroy the solemnity of contracting, if the release should pass the estate, and charge the tenant, when the

Of releases.

party was not really in possession. Thus tenant by the curtesy is tenant to the heir by the law, which he cannot alter by his own act; so he remains tenant to the action of waste, and to attorn to the grants of the reversioner, notwithstanding assignments; because the estate is merely created by the law; yet he is not capable of a release, because he has no notorious possession *in pais*, which may be enlarged into a fee. So if an infant makes a lease for life, and the lessee assigns it over to another, with warranty, the infant at full age brings a *dum fuit infra ætatem* against the assignee, and he vouches the assignor, who enters into the warranty; the demandant cannot release in fee so as to enlarge the estate, because the vouchee has no possession.

N. B. As in feoffments there was required the word *heirs*, to distinguish the feud from such as were not hereditary; so it must be inserted in releases that only come in place of the feoffment, in cases where the possession was transferred before.

Fourthly, Of releases that enure by way of mitre le estate.

When two several persons come in by the same feudal contract, one of them
may

may discharge to the other the benefit of such feudal contract by a release, because no notoriety is needful, since there was a sufficient notoriety in the prior feudal contract; and such a release is called a release by way of *mittra le estate*. Thus two coparceners come in, as it is said, to one intire feud, and descending from their father; and therefore they may release privately to each other, without any notoriety by feoffment; because they take by reason of the former contract, and descent to them, which establishes them in the possession, without a notoriety. But since the coparceners do also transmit distinct estates to their children, they may pass such estates by feoffment; for they have, in respect of the descending line, distinct estates, which they may pass by a distinct feoffment; but joint-tenants can only pass the estate by release, and not by feoffment, properly speaking; for they are in by the first feudal contract; and therefore a second feoffment cannot give any other farther title or notoriety, because every person shall be supposed to be in by the elder and most worthy title, which is the prior feoffment; therefore the second feoffment is impertinent. Nor is this any injury to a stranger's *præcipe*, for he may bring it against them all, according to the prior

Booth. 33.

prior feudal contract; and if any of them disclaim, the rest must defend for the whole, or lose their interest. But if there be two tenants in common, they cannot release to each other, but they must pass their estate by feoffment; because this estate being established by different notorieties, each having passed by distinct liversies, they must pass to each other by a distinguishing livery, or else it cannot be known in whom such parts are, which formerly had passed by a distinct livery.

Co.Lit.273.b.
200. b. 169.

N. B. That releases that enure by way of *mittre le estate*, need not have the word *beirs*, because the parties are not in by such release, but by the former feudal contract, which passed an inheritance, and the release only discharges the pretensions of one of them.

Of confirmation.

Confirmation is the approbation or as- Lit. sect. 515;
sent to an estate already created, Ld. Raym. 300.
which, as far as is in the confirmer's
power, makes it good and valid: so that
the confirmation doth not regularly create
an estate; but yet such words may be
mingled in the confirmation, as may cre-
ate and enlarge an estate; but that is by
the force of such words that are foreign
to the business of confirmation, and by
their own force and power tend to create
the estate.

A release passes away the right from the See. 516,
releasor, and by that means may conse- 517.
quentially strengthen the estate; but a con-
firmation primarily strengthens the estate,
and consequently so far as the estate conti-
nues, makes it good against the confirmer.
If my tenant for life makes a lease for
years, I cannot release to the lessee for
years, because there would want the attorn-
ment of tenant for life, and therefore the
right must pass, as is said, by grant and
attornment, and not by release; but I may
confirm the estate of tenant for years, for
there wants nothing but my assent to cor-
roborate the estate already in being.

I cannot

Sect. 518.

I cannot release to the termor of the disseisor, because he is a perfect stranger to the freehold ; so that the release is to one that has no right or possession of his own, and therefore it is to him a release of a naked right ; but I may confirm that estate which is already in being in him.

Sect. 519.
520.

If a man confirm the disseisor's estate for an hour, this passes the fee, even without the word *heirs*, because the disseisor has the fee ; and when that estate is assented to, the disseisee can never afterwards destroy it. So if he confirm the term of the lessee of the disseisor for some part of the years, he cannot defeat it during the whole term, because the term is confirmed ; and the last words being derogatory from his own grant, must be rejected ; but if he confirms the land to the termor, for part of the term and no longer, this is good, because the party that had right, did not totally assent by express words, as he did in the two former cases ; for if he did, no derogatory clauses from such assent could be admitted ; but his assent was originally but partial, and not to the whole estate, and therefore it cannot, contrary to the express words, be carried any farther.

Sect. 521.

If a man releases to tenant for life all his right, this enures to him in the remainder, because he parts with his whole ;
and

and he that has but an estate for life by the feudal conveyance, cannot have the whole fee, as is said. But if a man confirms the estate for life, it is an approbation and assent to that estate only, and therefore the assent being no farther than to the estate for life, it cannot be carried to strengthen the remainder; but if he had confirmed the remainder, that had confirmed the estate for life by implication; because the remainder cannot be without a particular estate to support it, therefore the confirmation of the remainder must imply an assent to all means necessary to support it.

If a man confirm the estate to one of Sect. 522. the disseisors, he only has the estate as he formerly had it, which was jointly with the other disseisor; but if he confirms the estate of one disseisor in the lands, to have and to hold the lands, or his right to him and to his heirs, then such disseisor shall hold out his companion; for such *habendum* explains the manner of his confirmation, *viz.* that he should not hold the estate meerly as it is, but in a manner more beneficial for him, that is, that he should hold the possession that he has *per my & per tout* to him only; for the *habendum* explains the assent, *viz.* that he should hold the possession sole; so that

Of confirmation.

the possession in the whole being confirmed to him only, he has the total right to such possession, and therefore may hold out his companion.

Sect. 523.

If one joint-tenant confirms the land to the other, this makes no alteration, for he confirms the estate in the same manner as it is; but if it be to have and to hold such lands to such joint-tenant only, he has a sole estate; for then he expresses a design of confirming the possession to him alone; so that the confirmation goes to the possession itself, by the explanatory words in the *habendum*, and not to the manner of possessing; and the words of the *habendum* make the confirmation enure as a new grant of such his moiety.

Sect. 524.

Where a man has an estate but for life, and he in the reversion confirms the estate to him and his heirs, the confirmation as to the heirs is void, because the estate is only confirmed, and nothing new is granted by such confirmation, and the estate can continue but for life only; but if it had been to have and to hold the land to him and his heirs, that had amounted to a grant of the fee; for then there appears to be a farther intent than merely to confirm the estate, *viz.* to enlarge it to him and his heirs; and taking the grant strongest against the grantor, it must pass away the fee-simple.

So

So where I let lands for life or years to a feme sole, who after marries, and I confirm the term to the husband and wife for their lives, this amounts to a new grant of the term for the life of the husband; for I not only confirm the old term, but erect a new one, since the words import more than a confirmation of the old term; for in that the husband has nothing in his own right.

If my disseisor, or my tenant for life, charge the land with a rent-charge in fee, and I confirm it, I shall for ever afterwards hold it charged, because I have assented to the estate, which has a being from such disseisor or tenant for life; and therefore I cannot afterwards destroy it.

If I only use the words *dedit & concessi*, that is as strong as the word *confirmavi*; for it amounts to a grant of the right to the person in possession; and if he has my right, I can never after impeach his estate.

Here the heir of the disseisor grants the right of possession, and the disseisee the right of propriety; for every one grants what he lawfully may.

The lord by confirming the estate doth not pass his right to the feigniery, because the confirmation or assent to that estate cannot be interpreted to pass that other distinct right which is in him, since the assent

assent to one estate is no reason to conclude that he has parted with the other; but if he had released all his right, he had extinguished his seignior, because by such remitting his right, he could not have demanded any thing.

Sect. 538, 9,
540.

The lord may abridge the services of his tenant by his confirmation, but he cannot enlarge them or create new services; for when he has confirmed the estate by lesser services, he has granted to the tenant the services that are over and above what was specified in the confirmation; because confirming the estate to hold by lesser services is, by implication, a grant or release of the rest; for he could not hold by lesser services, unless the rest were released; but if he confirms to hold by greater or new services, this is void, because this doth not amount to a new grant from the lord.

Sect. 541, 2, 3.

If I confirm a villain to another that has him in possession, this passeth nothing, because this is an incorporeal right, which cannot be divested out of me, and the meer confirmation, where a man has no right, is really nothing; for that which is not, cannot be meerly confirmed; but if there be the words *dedi & concessi*, it goes farther than meerly to strengthen the estate in the lands, for it passeth the right to the rent.

Of

Of attornment.

* **A**TTORNMENT is the consent of the tenant to the grant of the feignory, or the reversion, putting him into the possession of the services due from such tenant. The reason is three-fold. First, From the ancient feudal law. When the feignories subsisted in their ancient clans, they used to be continually contending with each other; and it was frequent in those times to make peace upon amicable concessions to each other; but if upon such grants they should have subjected any feudaries to the other lord, it might have been to the infinite prejudice of such tenants; for though such contending lords might agree, yet the grudge might continue to the tenants; and therefore the policy of that old law was, that their fealty was not to be carried over to any other, without their consent, from whom they

Lit. sect. 551.
Bracton, l. 2.
c. 35. f. 13.

* The doctrine of attornment was partly avoided by the present method of conveying to uses. *Vide Stat. 27 H. 8. c. 10.* And it is now, by a late statute for amendment of the law, quite abolished. *Vide Stat. 4 Ann. c. 16. f. 9.*

G

might

Of attornment.

might expect oppression rather than protection.

Secondly, That the tenant might know to whom the rents and services were due, and to distinguish the lawful distress from the tortious taking of his cattle; and this reason was so prevalent, that when the law gave a free alienation, in respect of the superior lord, yet the tenant's right of attornment continued unaltered.

Thirdly, That by the tenant's lawful payment to the grantee of such feignior or reversion, he might be put into possession of such feignior or reversion; and that by the payment of such rents, and doing of such services, which anciently lay in going to the wars with their lords, and plowing their grounds, all men might know in whom such rights were vested. And here the most general rule is, that the tenant cannot alter the grant, but only attorn to it; and by such his attornment, can make no variation in the grant itself: for the tenant has no right to the reversion, and therefore cannot alter the disposition of it one way or the other; but he has a right to the possession, and therefore can put whom he pleases into that possession which he has in him.

If

If the lord grants the services to one, Lit. sect. 552, and afterwards, by a deed of later date, ^{3.} grants them to another, the tenant may attorn to which he pleases; for the seigniory or reversion in such cases vests in the lord or reversioner till attornment; for by the deed nothing passes till the grantee is put into possession by the attornment, no more than a deed of feoffment passes the feud before the feoffee be put into possession by livery; so that if he that has the last deed has the first possession, he is the feudary, because by the notoriety of the livery *coram paribus*, the feud passeth. So when it is a reversion or seigniory, which do not lie in livery, it must pass by the notoriety of the tenant's attornment: So if a man grants a reversion in fee, and afterwards grants it to another for life, the tenant attorns to the grantee for life, he shall never attorn to the tenant in fee; so if a man grants a reversion in fee upon an estate for years, and after confirms the estate to the tenant in tail, he shall never attorn to the grantee; because after the acceptance of such confirmation, he cannot put the tenant in possession according to the grant, because the reversion is altered by such his acceptance; and when he cannot put the grantee in possession of the thing, as

Strange 79.
Ibid. 106.

Of attornment.

it was granted, he can make no attornment at all; for his attornment cannot vary or alter the original grant; and if the tenant could alter the grant by his attornment, no body could tell by such grants in whom the seigniorship or reversion was lodged; and so the notoriety of the attornment, as correspondent to such grants, would be altogether destroyed. And it is highly probable, that as their liveries were anciently very notorious *coram paribus*, so were their attornments also; and such grants *coram paribus* were read and remembered; and if the attornments were not to correspond with the grants in all things, it would have caused infinite perplexity and quarrels to have adjusted such differences.

If the reversion be granted to one for life, the remainder to another in fee, if the tenant attorns not to tenant for life, he cannot attorn to the remainder-man; because, if there be no particular estate, there can be no remainder; and there can be no particular estate, unless the tenant gives him possession by his attornment.

Co. Lit. 310.

Lit. sect. 554,

5, 6, 7.

The rule that governs these cases is, that he that owes the services must make the attornment; and therefore where the tenant in fee makes an estate for life, yet he remains tenant to the very lord, and must

must attorn to the grant of the feignior; but if he makes a lease for life, the remainder in fee, the tenant for life must attorn to such grant; for this is an alienation in fee; and so by the statute of *Quia emptores* they must hold of the very lord; for since the statute no man can erect a new tenure; and a new tenure would be created, if the tenant for life were to hold of the remainder-man, and he were to hold over; and the words of the statute carry it for tenant for life to hold of the chief lord. *De cætero liceat cuilibet homini libero ad voluntatem vendere, ita quod feoffatus teneat terram illam de capitali domino feodi illius per eadem servitia & consuetudines per quæ feoffator tenuit.* Now the tenant for life is properly the feoffee in this case, and therefore is to hold of the lord, and by consequence must attorn to the grant of the feignior; and since he holds by the services of the whole fee, he makes an attornment as the very tenant, and there needs no subsequent consent of him in remainder. If the tenant be disseised, yet such disseisee shall attorn to the lord, because the feudal contract continues. But to the grant of a rent-charge, or a rent-seck, the tenant to the land must attorn, because it is only the land is liable, and

Of attornment.

no body else, but as tenant of the lands; and therefore the land being to yield the rent, it is the tenant of the land only that is to consent to such grants, and put the grantee into possession; for no man can put him into possession of rent issuing out of such land, but the tenant of the land itself. Therefore if there be very lord, and very tenant be disseised, and the lord grant the rent off from the other services, the disseisee cannot attorn to this grant, because it becomes a rent-seck in the grantee; and then none can attorn but the tenant in possession of the land, that is to pay it, because he must be put into possession by the tenant of the land; but if the lord had granted all the services, the disseisee might have put the grantee in possession by attornment; because the tenant may be compelled to do the services, being still tenant by the feudal contract, and may compel the lord to avow upon him; but he is not compellable to pay the rent, which is turned into a rent-seck, but as he is tenant of the land, which he is not after the disseisin.

Co.Lit. 311. b. If a disseisor makes a lease for life, the
 Lit. sect. 558, remainder in fee, and the disseisee releases
 9, 560, 1, 2, 3. to the tenant for life, this shall enure to
 him in the remainder; for the release, as
 is elsewhere shewn, cannot alter the no-
 toriety

tority of the feudal feoffment; but the release of the feudal lord to the tenant for life shall not enure to him in the remainder; for the feudal feoffment is not prejudiced; and stands in full force, whether it enure one way or the other, and therefore it shall enure to the benefit of him that purchased such seignior; and he would not have the benefit of the total purchase of the seignior, if the release were to enure to him in the remainder; but if there be tenant for life, the reversion in fee, if the lord grants the services to the tenant for life, the reversioner must attorn, because he holds of the lord; but such attornment does not alter the tenure of the estate for life, for that cannot be altered in such attornment; for it cannot be thought that a bare assent to the grant should ever be interpreted to discharge the tenant out of his fealty, and to release all manner of services, without any words or deeds whatever. But the tenure, which the tenant for life purchased, is superseded during the continuance of the estate for life, as to all the possessory fruits of such tenure; for the tenant for life cannot hold of the reversioner, and yet the reversioner holds of him; for he cannot exercise the prerogatives of a lord over one

Of attornment.

to whom he owes fealty, * and therefore he can have no wardship, marriage, † or relief of the reversioner; but if the reversioner dies without heir, it shall escheat, ‡ because the tenure of the reversioner is gone by his dying without heirs, and therefore the cause of the suspension is taken away; and therefore the tenant for life may have the fee without prejudice to any one; but the tenant for life may not grant the seignior, during the suspension, because the seignior is drowned in the lands, and he has not an estate in the seignior distinct from the land; so that the grantee can make no title during such suspension, because there are no services due from the reversioner during the continuance of the estate for life. But if the very tenant in fee make a lease for life or years to the lord, yet the lord may grant the seignior, because the services continue, notwithstanding the lease; for the tenant holds the reversion of the lord as he did before; for the taking the lease shall be never interpreted as a destruction

* *Crag. de jure feud.* 45, 46, 47.

† *Bracton*, lib. 2. c. 36. *Fleta*, lib. 3. c. 77. *sect. 1.*

‡ *Feud. lib. 2. tit. 24. Zasius in usus feud.* 83.

of the services that were before due to the lord, while the tenancy of the fee-simple has a continuance; but if the lord disseise the tenant, or the tenant make a feoffment to the lord, then he cannot grant the seignior; for the lord by the common law, in the first case, and the Co. Lit. 314. statute of *Quia emptores* in the second, 564. holds of the next superior lord, and he Vide post. sect. 582. has no seignior distinct from the land Lit. sect. 565. itself.

If a tenant gives a penny as attornment, this will not found an assise, because it is no seisin of the rent, unless he gives it in the name of seisin; but the grantee may have a writ of rescous, because the distress is lawful, being annexed to the services that pass by the attornment, and therefore the rescue is tortious.

The attornment of one joint-tenant is good, for both are tenants of the whole land, and the services are due for the whole land; and since the whole services are due from both, either may consent for the whole, and the distress grows to be notorious on the land for the whole. Sect. 566. Ld. Raym. 312.

The attornment must be during the life of the grantor, because otherwise the reversion descends to the heir of the grantor, Sect. 567, 8, 9.

Of attornment.

tor, who has the right in him, and never granted it out of him. *Vide post.*

Sect. 570.

Vide post 582.

If either the tenant for years or for life in this case attorn, it is good, because the tenant for years holds the estate for years of the reversioner, and pays the services to him, and the tenant for life holds the freehold of the reversioner; so that both in different respects hold estates of him, and his release to either, as is said, is good enough. But here it may be asked on *sect.* 569. If there be tenant for life, remainder in fee, if he in remainder grants the remainder, why tenant for life must attorn, when he does not hold of the remainder; but of the very lord, as is said before, by force of the statute of *Quia emptores*; and the attornment must be made according to the tenure, by the rules aforesaid laid down. But though there be no tenure of the remainder-man, yet the attornment of the tenant for life is required for two reasons. First, because the remainder-man came in by the feudal feoffment, and therefore could not pass without the utmost notoriety, and this was by attornment *coram paribus*, and possibly such grants and attornments might be anciently made in their courts; but however such notoriety was attributed to

to the attornment, that the feudal seoffment could not be altered without it. Secondly, because the action of waste, and the forfeiture of tenant for life, was to him in remainder; and since he lay liable to several actions to the remainder-man, it is fit that he should attorn to the grant, being to some purposes attendant to him; though by the statute the feudal service was to be paid to the very lord.

But when secret seoffments were allowed before two or three persons, without being *coram paribus*, so were also secret attornments before two or three persons, without being *coram paribus*; and by the same reason, if there was tenant for life, and he in reversion confirmed the estate to tenant for life, with the remainder to another in fee, this was good to vest the remainder; for the accepting of this confirmation implied an assent to the remainder that was thereon limited; but then it was necessary that it should be by indenture, and the remainder-man should have one part; because otherwise the remainder-man would be never able to shew this grant, and the assent of tenant for life; for the assent could not be shewn unless he had the deed to which he was party, and whereby his acceptance would appear to the court.

If

Of attornment.

If two joint-tenants make a lease for life, they may afterwards release to each other without any attornment of tenant for life; for since both of them have the reversion, the tenant for life is tenant to them both, and consequently there is no need of any subsequent consent to create a new tenancy; and paying the rent, and doing the services to one only, is a sufficient notoriety, that the whole fee is in one only. So if there be tenant for life, the remainder for life, he in reversion may release to him in the remainder for life; for there needs no notoriety to the first tenant for life, because he already assented to the limitation of the remainder in the original creation of the feud; and therefore there was no danger that he should be subjected to his enemy, and there is sufficient notoriety to all strangers by his holding of him in the remainder, as there was a sufficient notoriety in the first case of the confirmation, by the tenant's holding over of the feudal lord.

- Lit. sect. 576, 7. These sections stand upon the most evident property of a feudal feoffment; for such feoffments cannot be defeated but by acts of equal notoriety to the feoffment; since the feoffment passes the fee by a notorious ceremony, it cannot be destroyed but by an act of equal notoriety, that is,
by

by such an entry as defeats the whole fee; therefore if a man makes a lease for life or years, and then enters and ousts his termor for years, or disseises his tenant for life, and then makes a feoffment; if the tenant for life or years re-enter, he leaves the fee-simple in the feoffee without attornment; for the tenant for life or years by his re-entry cannot defeat the whole feoffment, because he has only a right to an estate for life or years; and if his act of entry cannot destroy the intire operation of the feoffment, then must some part of the estate that passed by the ceremony of this feudal conveyance, be left in the feoffee. So it is if tenant for life or years recovers by ejectment or assise, yet he leaves the fee in the feoffee; for the intire operation of this feudal conveyance is not destroyed by this recovery; and if it be not destroyed, the fee must reside in him. But it will be objected, by this method a man may be forced to attorn to his enemy: *Answer*, It is better the tenant should receive some small prejudice, than the rules of feoffments, upon whose notoriety every man's estate depended, should be broken. Secondly, It is the tenant's own laches, that he suffered himself to be ousted or disseised; and therefore it is to be presumed that he was satisfied of the feoffee.

But

Of attornment.

But then how if they had entered *vi & armis*, and ejected him. *Answer*, It seems that then such subjecting to another, contrary to his will, should be considered in an action of trespass, and the tenant should be recompensed for it in damages.

If a lessee for twenty years makes a lease for ten years, the second lessee cannot attorn to the grant of him in reversion, because he holds of him; but if the reversioner enters upon such lessee, and makes a feoffment in fee, and the lessee re-enters, this leaves the reversion in the feoffee without attornment.

6 Rep. 69.

So if a man makes a lease for life, and then grants the reversion for life, in this case, if he were to grant the reversion in fee, the grantee of the reversion must attorn, because he immediately holds of the reversioner in fee; but if the reversioner in fee disseises the tenant for life, and makes a feoffment, and tenant for life re-enters, he re-settles himself and the grantee for life in their estates, and leaves the reversion in the feoffee; for the lessee for years, in the first case, and lessee for life in the second, by their entry, re-settle themselves and their reversioners in their estates; but they leave the remaining part of the estate in the feoffee, because as much of the feoffee's estate, as is not defeated

defeated by their entry, must be left in him.

If two joint-lessees for years or life be ousted or disseised by the lessor, who makes a feoffment, and one re-enters, he leaves the fee in the feoffee, *causa qua supra*. If lessor disseise his tenant for life or years, and makes a feoffment, and the lessee re-enters, the rent thereon reserved is revived, and ought to be paid to the feoffee, because when the lessee enters, he must hold the particular estate of some body; and if he be in of the same estate he must hold of the same services; and since the feoffee is in by feoffment, he must hold as of his reversion. But if the grantee of a rent-charge disseises the tenant of the land, and makes a feoffment in fee, and the tenant re-enters, this can never be revived, because the feoffor cannot have it again, contrary to his own feoffment, and the feoffee can never have it, because he was only seised of the land, and not of the rent, and the rent was never transferred to him.

Where a lease is made for life, the remainder in tail or for life, the remainder to the right heirs of tenant for life, tenant for life has the remainder in him, and he may grant it; otherwise it is where there is a lease for years, the remainder in tail

Co. Lit. 319.
sect. 578.

tail or for life, the remainder to the right heirs of tenant for years, then the tenant for years cannot grant it; for the remainder is vested in the right heir as a purchaser. The reason of the difference is, that in the first case the tenant for life is tenant to the lord, being properly *feoffatus* within the statute of *Quia emptores terrarum*, as is said *sect.* 554. And therefore when a remainder is afterwards limited to the right heirs of tenant for life, such tenant shall be * in the homage of his lord, because he has an inheritance for which he ought to vow to venture his life, and the lord shall have the fruits of such feudal inheritance; for if the intermediate estate be extinct, during the minority of the heir, the lord shall have the wardship and marriage of him, and shall have the heriot of such tenant dying seised. *Vide Hale sur Fitz-*

* As to the antiquity of homage, it is very remarkable, that *William* the First (commonly called the Conqueror) about the twentieth year of his reign, just when the general survey of *England*, called *Domesday Book*, is supposed to have been finished, and not till then, summoned all the great men and landholders in the kingdom to *London* and *Salisbury*, to do their homage to him. *Hale's Hist. of the com. law* 109. *Madox's Hist. excheq.* fo. 6. in marg.

berbert 143. And by consequence the inheritance must be supposed to reside in tenant for life; and were the construction otherwise, it would apparently tend to the weakening the tenure and state of the whole kingdom. Therefore such interpretation ought to be made, as best supports the tenure, when the words will bear both senses. But in the second case, the tenant for years is not the *feoffatus*; for the person properly that takes by the feoffment is the freeholder, and the tenant for years is but the bailiff to the freeholder; and it is the freeholder, that is attendant to the superior lord, may be in his homage, and that holds of him, and from whom the services are due. Therefore this remainder to the right heirs, is not immediately vested in the tenant for years, because the heir is the first that can have the freehold, as feudal tenant to the lord; and therefore, by the words of the grant, he must be the first purchaser of such freehold; and because the tenant for years cannot hold of the lord; or the lord avow upon him, no other interpretation can be made. *Co. Lit. sect.*

Therefore if a lease be made to *A.* for years, with livery, the remainder to the right heirs of *A.* this is a void feoffment, not only because the freehold, would be

H

in

in abeyance, and there be no person for the stranger's *præcipe*; but also because there would be no person in the mean time for the lord's avowry, and to answer his services; and therefore such remainder must be void in the very creation of it; because there is no person in whom the freehold can vest; and if the act of *gortoriety* doth not deliver over the possession of the freehold, it is a nullity in the very act of delivering possession, and altogether impertinent. So it is if such estate were limited by way of use executed; because if the feoffor does not part with the use out of him, the old use is executed on the feoffment; for the freehold cannot be in abeyance till tenant for years dies, and it does not execute in the feoffee without consideration; but it seems it were good by way of executory devise, if the contingency avoids a perpetuity, by happening during a life; because then there is no immediate transferring of the freehold, but it vests in the heir to answer the stranger's *præcipe* and the lord's services, until the contingency happens; and it seems it should be a good limitation in the case of a chancery trust, where the legal estate is in the feoffee. But if tenant in fee makes a lease for years, life, or gift in tail, the remainder to his own right

Ld. Raym.
314, 316,
523.

Stra. 969.
Ib. 996.

right heirs, or executes such limitation by way of use, he is in his old reversion, because he never put himself out of the homage of his superior lord; for it shall not be construed a contingent remainder in the right heirs, because he has not parted with any thing in the reversion, but to his heirs, to whom a man cannot make a limitation; for he must have the fee in him in the mean time, till the contingency happens, and therefore must remain tenant to the lord, as he was before; and then it were a very hard construction to make this a contingent remainder only to destroy the fruits of the feudal tenure, when the ancestor held as very tenant to the lord during his life. *Co. Lit.* 22. and *Hale* upon it. *Cro. Jac.* 590. 2 *Roll. Rep.* 196, 216. 3 *Leo.* 64. *Dyer* 7, *Popb.* 3. 1 *Co.* 130. *Moor* 118, 119, 284, 5, 720. 2 *Co.* 91. 1 *Co.* 104. *Cro. Car.* 24. *Hob.* 27, 30. 1 *Mod.* 96, 98, 121, 122. 1 *Vent.* 372, 382. 1 *Roll. Abr.* 827, 841. 2 *Roll. Rep.* 196, 216. *Bro. Feoffment to uses*, 338. *Dyer* 156, 237, 362, 235, 308.

It is here to be noted, that by fine the estate passes before attornment, and the grantee by fine shall have the wardship, or enter for an escheat or for forfeiture, before the attornment in the *quid juris*

Of attornment.

clamat; but he cannot distrain or have an action of waste, writ of entry *ad communem legem in consimili casu*, or in *casu proviso*, or a writ of ward, or of customs and services, the grantee cannot have before attornment; but what the lord may seize he is intitled to before attornment, as the heriot, wardship, &c. Now to understand this, we must go into the ancient manner of conveyancing, which was of two sorts; either by fine or feoffment. The fine was in the lord's court, and by this they passed all feudal right which was in possession; and there are instances as low as the time of *H. 2.* and *Ed. 2.* of fines in the court of the lord, *Madox* 15. and they were called fines, because a fine was paid to the lord for such agreement, because it transferred the feudal right held of the lord. Now in such courts they passed all the right the tenant had in possession; but the right of action could not be transferred, because that would have encouraged maintenance; therefore whatever such grantee could seize past by this feudal conveyance, but the right of distress and of action did not pass without attornment. The feoffment conveyed the feudal possession *coram paribus*, out of court; for it was necessary to convey sometimes before the court was held,

and

and then the possession was delivered over *coram paribus*; but as there were two conveyances of copyhold, one in the lord's court, and the other to the customary tenants; so in freehold, where the immediate grant was to the feoffee, and not to the lord, as in the copyhold; yet there were two sorts of conveyances, one by fine in open court, the other by feoffment *coram paribus*: the right only passed by fine, because the possession being in the grantee, they might well stay till the next court to transfer the right; but where the possession was to be parted with, or service to be done, or money paid, there the usual way was *coram paribus*, that the feoffee might not lose the profits in the mean time, or the possession be delivered before the contract could be compleated. Thus it stood some time after the conquest; but the after kings endeavouring to retrench the privilege of the great lords, * they first in *Magna Charta*, and after by the statute of *Quia emptores terrarum*, began to admit of alienations without fine to the lord; and the

* *Statut. de Prærog. regis 28. a.*

Of attornment.

acts of the court-baron were only esteemed to create notoriety among the tenants of the manor. From hence grants in the lords courts were omitted, and the attornments *in pais* were the only notorieties of such grants, no fine being paid to the lord; and the king's courts creating a notoriety all over the land, the usual way was to make the grant in the king's court in this manner. They used to suppose that the parties had covenanted to alien; and all writs of covenant, as being an action of publick concern to the justice of the kingdom, were sueable only in the king's court; and by consequence this covenant to alien was sueable there; and that court being possessed of the matter, as an adversary cause, they were admitted to make all manner of agreement touching such suit depending; and these agreements being amicably made by way of composition before the king's court, it became the justice of the king's court to see them performed; and therefore a *scire facias* issued to execute the fine, and a *quid juris clamat* to the tenant; but by the fine nothing passed but what the grantor could seize, and not the right of action, for the danger of maintenance; but in the *quid juris clamat* the tenant was compellable

compellable to attorn, unless he could shew that he was submitted to his enemy; so that here the provision made by the *quid juris clamat* was for the interest of the tenant; but the tenant was not compellable to attorn in two cases. First, if the tenant were tenant in tail; for he claiming such a right, as by possibility may continue for ever, is looked upon as master of the estate, and not bound to transfer the reversion according to the pleasure of the grantee. Besides, the statute law is, that the will of the donor be observed, and therefore they cannot compel him to transfer the tenure; but if he attorn *gratis*, it is good, because then it cannot be presumed to be to the prejudice of his issue. Secondly, the tenant shall not be compelled to attorn, if the grantee will not allow the privileges belonging to the estate; as the tenant shall not be compelled to attorn to the mesne, unless they allow his privilege of acquittal against the superior lord. Nor the tenant for life, where he is not impeachable for waste, unless they allow that privilege, because this being a final agreement, with the utmost notoriety in the king's court; the tenant can have no new privilege, but what appears of record. So if grantee has

Of attornment:

a *scire facias* against the tenant, and has judgment to execute the fine for any part of the services, it is an attornment for the whole; for the tenant had opportunity to plead in the *scire facias*, why he should not be compelled to attorn.

Sect. 585, 6. There needs no attornment to a devise, because these are by the customs of towns and boroughs for the promoting of trade, and do not require the notoriety of a feudal conveyance; and as no livery is required, where it is an estate in possession, so no attornment is required, where it is a reversion.

Sect. 587, 8, 9, 590, 1. Of a right a man cannot properly be disseised, though he may of his possession; for it is a contradiction in terms; that a man by wrong should have my right; therefore I cannot be disseised of a reversion, while my tenant remains in possession; for though my tenant should attorn to some body else, that would not put me out of possession of my reversion, because the right being in me, it could not be transferred to any body else, but by some act of my own; and the payment of my tenant is but a wrongful payment, and doth not give him my right. So it is if I am seised of a rent-charge; and the tenant of the land pays it to another,

other, this does not devert me of my right, because the wrongful payment of my tenant cannot alter my right; it is therefore a payment in his own wrong, and it still remains in arrear to me; but if I am disseised of the demans of my manor, the services yet remain in me, because the right to the services, by the feudal contract, is not deverted out of me by the wrongful possession of the demans of my manor; but because all the feudal services are to be done in support of the manor, the knights services being the attendances of such tenants in the general defence of the realm, imbodyed under the lord of the demans, that carried provisions to subsist them; and the socage services were the actual plowing in the demans of the lord; therefore if the tenants attorn to a disseisor, it puts him into the possession of such services, as accessory and belonging to the demans of the manor; and if the disseisor die seised of such demans as the principal after attornment, then the disseisee, as it seems, cannot distrain for the accessory right of the services; but though the tenant doth attorn to the disseisor, yet he may afterwards refuse, to avoid the double charge, because this does not take away the right of

Ld. Raym.
862.

Hale's Hist.
C. Law, p.
107.

Of attornment.

of the disseisee, but that he may enter into the demeans, or distrain for the services; for till the right of possession is gained by a descent, the disseisee may recontinue which part of the manor he pleases. If a man let parcel of the demeans for life, he is still lord of the manor, and the reversion is still parcel of the manor, because held of him as lord of the whole demeans, and therefore shall pass by a grant of the manor; but if a manor be leased for life, excepting black-acre, black-acre is not held of the manor; for it does not hold of such tenant for life, but is severed from the manor, and therefore will not pass by a grant of such manor; otherwise it is, if such lease had been made for years; for then the freehold had been intire, and one and all had therefore passed by the grant of such manor.

Of discontinuance.

IT is an alienation of the possession, See. 592, 3,
 where the right of action is left in an- 4, 5, 6, 7.
 other; and it began in the case of the
 husbands alienations of their wives lands.
 By the civil law, the father gave the *dos*,
 which was the estate of the wife, given
 on the marriage; and if it consisted of
 matters moveable, the husband had the
 possession, but was bound to restitution at
 his death; and even an action was al-
 lowed to the wife, in case the husband
 fell to decay, to recover during his life.
 If it consisted of things immoveable, the Ld. Raym.
 husband could not alien without the con- 72, 1384.
 sent of his wife, by the *Julian* law; and
 by *Justinian's* reformation, he could not See. 625.
 alien, though with her consent. *Constance*
matrimonio rei dotalis dominium civile pe-
nes maritum est, naturale penes uxorem.
Dig. lib. 23. tit. 2. De jure dotium. Ibid.
tit. 5. De fundo dotali.

When the feudal law allowed the in-
 heritance to descend to women, then be-
 gan the rights of the husband to be set-
 tled. Now, since all the feudal estates
 were reckoned civil rights, therefore there
 was no room for the distinction of the
 civil

Of discontinuance.

civil law, that placed the civil right in the husband, as the head and governor of the family, and the natural right in the wife, the legitimate owner. The *German* and *Northern* nations were the strictest observers of the rules of marriage, tying only one man to one woman, and enjoining strict obedience to the husband, even before their receiving christianity, and much more so afterwards. Then when the woman was allowed to succeed into the feud, when she took husband, she had no separate property, but the whole power was lodged in the husband, and they were reckoned as one in interest; therefore the husband had the right of possession, and the wife the right of propriety; or in other words, the husband was seised in the right of his wife; this distinction was before known in the feudal law; for every person that came in by descent, or by lawful alienation in manner before-mentioned, by the ancient feudal law, had the right of possession; therefore the husband being possessed of the wife's lands by the marriage contract, was supposed to have the right of possession; and by consequence the husband having aliened such right of possession, she was anciently driven to her writ of right, by the opinion of Sir *William Herle*, as I think by the better

Str. 229.

Id. Raym.
521.

better opinion, 5 *Ed.* 3. 58, 2 *Inst.* 343. for the wife could not complain of disseisin done to the husband, because they were one in estate and interest, and the husband could not do her wrong; and it would be very absurd for the law to have allowed to complain on the memory of her husband, as though he had been guilty of a violent disseisin; therefore the ancient law gave no possessory action, which complained of a violation of possession, but only allowed her to controvert the right; but when the writs of right grew so tedious, and the trial by battail grew out of repute, the law gave her a recovery by the writ of entry of *cu. in vita*; and the husband was the rather supposed to have the right of possession in him, for that being the superior and governing power, he might defend the possession by all actions; and therefore if the husband lost by default in a possessory action, this put the wife to a writ of right, as before, till the statute of *West. c. 3.* but now an actual entry is given to the wife and her heirs, by the 32 *H. 8. c. 28.*

The prelates, abbots, and other ecclesiastical persons that attended the courts of the northern princes, received great favour and donations from them; and to aggrandize the church, and other political reasons,

Of discontinuance.

invested them into those great bishopricks to which those feuds were annexed; and gave them such investiture by the ring, virg and staff, as a symbol of the feudiary dependance upon them. *Ibid.* 149. So that during the vacancy of a bishoprick, the king had the guardianship of the spiritualities, as he had the ward of his temporalities; so that if a vacancy happened, the king had the right of presentation to such livings, where the patronage was in the bishop, and presented to the bishop succeeding. *Godb.* 264. Shortly after, at the council at ——— they endeavoured to set up tithes as a christian demand that had been anciently a tax to the eastern princes, and the priests and *Levites* in the *Jewish* theocracy. And whereas the bishops used to distribute their estate, upon oblations, by the ancient rules of the church, among their own presbyters, and the poor; now they reserved the lands to themselves, and the profits of the lands and the tithes became an ample provision for the rest of the clergy; therefore encouragement was given for building of churches in smaller districts; and all such persons as built and endowed, were to have the right of presentation, the bishop condescending, upon such considerations, to fix the tithe, and the fixed residence of the

the priest, to the church, during his life, that was before only itinerary. *Ibid.* 113. But because the care of souls was only committed to him during life, he was not capable of the fee, and therefore the fee was in abeyance; so that there was this difference between the characters of the priests and bishops, that the bishops succeeded in their own original right, as the successors of Christ and his apostles, the great bishops of souls, and therefore what they took was to themselves and successors; but the priests were only the substitutes of the bishops, and therefore could not take but during their lives. The parson therefore being only capable to take for life, for he had no proper successor to himself, the next parson coming in from the bishop, and by his institution; and yet the fee being out of the patron, and not given to the bishop, but appropriated to the use of that particular church, it was said to be in abeyance; but to all beneficial purposes, the law allows him to suppose himself to have an inheritance, though he has not properly any successor; and therefore the parson may bring an action of waste, a writ of entry *ad communem legem, in consimili casu, ad terminum qui præterit, a quod permittat in the debet*, a writ of meise, a *contra for-*

Of discontinuance.

nam feoffamenti, and shall receive homage, because these are for the benefit of the fee in abeyance; the defence of which the law has committed to him; but the law has provided him a *juris utrum*, and he shall not have a writ of right, since, for the reason above-mentioned, he cannot claim it as his right and inheritance.

Co. Lit. 341.

But though the bishop sent out the presbyters to fill the cure, yet they reserved a number of presbyters; and as formerly all the presbyters were consulted touching the affairs of the church and the disposition of the church revenues; so now, when the presbyters were settled in the parochial church, they consulted this select number, which anciently were ten; and these were allowed a stipend out of the church estate, called *præbendum*; thence they were called *præbendarii*, and the dean had his name *quia denis præpositus*.

When churches were thus regularly settled, the bishop began to assume a supreme power, and by many acts and new doctrines, set himself at the head of the church; and then he was willing to settle the election of the bishop in the chapter, and on their differences, to frame an appeal to himself. And in the wars, in the time of King *John*, they got this succession,

115

Donatives are parts of the king's *regale*; for as he invested persons in their episcopal jurisdiction, so he could erect churches exempt from their visitation; for since the prince constituted the extent of the bishoprick, and gave the feuds that supported it, he could limit the bounds of such jurisdiction. Therefore before the parochial right of tithes were settled, he might erect a donative with tithes and cure of souls; and at this day he may erect a chapel donative with lands, or empower any man to erect it, because he takes away none of the settled rights of the church. But such church or chapel must be consecrate, and such parson must have orders from the bishop, otherwise he cannot officiate in spiritual things; but such church (if presented to by the lawful patron) becomes presentative, because the bishop thereby takes upon him the cure of souls there, by the consent of the lawful patron; and then by the rules of

the christian religion, he cannot lawfully part with them. But if he take up the presentation from a disseisor of the manor, this makes no such alteration, for the bishop has not the lawful cure by such presentation; but the parson of such donative churches has the land only for life, after the manner of other presentative parsonages; for that is the intent of the erection; for the design of the prince is not to constitute a bishop to have perpetual successors, which power perhaps is not in the prince, but must by the rules of the church come from the successors of the apostles; but it is his design to erect a parsonage out of the jurisdiction of the bishop, which he may do, because he may determine the extent of the diocese, and being erected in analogy of a parsonage, the property must be supposed in him as in others. *Co. Litt.* 344. *Digest.* 197. *Godb.* 201, 202. 1 *Roll. Rep.* 2, 3. 6 *H.* 7. 13. *Britt.* 100, 103, 4. and from 205 to 250. and especially 238.

The third sort of discontinuance is that of tenant in tail, and he is considered as the person that has the inheritance in him, and therefore has the right of possession inheritable. When therefore such tenant in tail makes a feoffment in fee, he alienates the right of possession; for though the
statute

statute *De donis* preserves the right of the heir, yet it does not preserve the possession; for it would have been absurd to say, that tenant in tail could have committed a disseisin upon his heir, who is to take by right of representation from him. Hence also the statute gives the form-don in descender, remainder or reverter, as the remedy to recover the possession, together with the right of propriety; and there is no action to recover the one distinct from the other; therefore the feoffee of tenant in tail has the right of possession, and the issue the right of propriety in him.

There is also a farther reason of convenience, why in all these three before-mentioned cases, the entry is taken away, because the feoffment had anciently a warranty annexed unto it, which defended such right of possession; and when a man had a warranty to cover his possession, it was not fit he should be put out of possession by any act *in pais*, without bringing in his warrantor by voucher; and therefore the entry was disallowed in such cases, that a man might not be obliged to the expence of getting his judgment in the writs of *warrantia charta*.

If tenant in tail be disseised, and re-<sup>Sect. 598, 9^a
600, 1.</sup>leases to the disseisor all his right, this

Of discontinuance.

works no discontinuance; for a release being a conveyance in secret cannot pass a possession; for a possession by the rules of the feudal law cannot pass without a notorious ceremony *coram paribus*, that the stranger may know in whom the fee is lodged, and against whom to bring his *præcipe*; as also that the lord may know in whom the fee is, that he may avow upon his tenant, so that the release can pass the right only. But the disseisor that has the possession, may take a release of the right, because he may make his wrongful possession rightful, if the disseisee conveys his right, and the stranger has no injury, since he must bring his *præcipe* against the tenant in possession, and the lord may avow on either, till notice of the conveyance and tender of arrears, and then must avow on the releasee only, since the statute of *Quia emptores*. But since the right of possession is in tenant in tail, why may not he pass the right of possession to the disseisor by such release? The answer is plain; A conveyance that cannot pass the possession, cannot pass the right of possession; for no conveyance can pass the right of possession distinct from the right of propriety, but such a conveyance that passes the very possession, which a release, being a conveyance without
out

out solemnity, will not do. But the harder question is, What estate hath such a disseisor, after such a release by tenant in tail? Some have said, that he has an estate to him and his heirs during the life of tenant in tail; so that then he has only a freehold, and the heir is a special occupant, and has no fee in him, because a less estate by right, will drown a greater by wrong; for a man shall never be presumed to do wrong, when he may hold by right. 1 *Saund.* 261. Others have held that the disseisor has, in such case, a fee-simple, and that his wife is dowable, but that it is determinable by the entry of the issue in tail; and the reason is, because when a disseisin is committed, the whole fee is notoriously in the disseisor by his possession, which cannot be abridged and turned into an estate for life without an act of notoriety. For if there could be such transmutation of estates without the solemnities of entry, no man would know in whom the fee resides; so the release leaves the disseisin *in statu quo*, as to the entry of the heir on him. For this see *Co. Lit. p.* 106. and 108. *b.* 10 *Co.* 96. *Seymor's case*, revived by *Holt* in the case of ———. And the same law of a bargain and sale; for that, when it came over from equity to be a conveyance at

I 4 law,

Ld. Raym.
996, 998,
1000.

Of discontinuance.

law, passed only a right, as a release to disseisor would have done before. But a release with warranty works a discontinuance; for at common law, the warranty was a voluntary covenant of the force of a feudal contract, and repelling the warrantor from claiming the land, and obliging him to defend it. And though the statute takes away the force of such covenants, that they shall not bar the issue, yet the issue must claim in the method the statute prescribes, *viz.* by action, and therefore it works a discontinuance, since the issue in such case cannot recontinue but by action only.

Sect. 602, 3,
4, 5.
Ld. Raym.
435.

But the warranty must descend on the person's claiming the land; for if he be not heir, he is not bound to defend the lands, after the manner of a feudal lord; and therefore he is not repelled from claiming them.

Sect. 606, 7, 8,
9, 10, 11, 12.

Are all several instances of conveyances, which pass the right, and work no discontinuance.

Sect. 613.

If tenant in tail grant all his estate in fee, and gives livery thereon, this works no discontinuance, because he has an estate for the purpose of alienation, but for term of his life. Sect. 614, 15, 16, 17, 18. are farther instances of conveyances that pass

pass a right from tenant in tail, and therefore work no discontinuance.

If tenant in tail makes a lease for life, Sec. 619, 20, this works a discontinuance during the 21, 22, 23, 24. estate for life, because he parts with the freehold out of him, and gains a new reversion to the tenant in tail. Now if he grants this new reversion in fee, and tenant for life attorns, and tenant in tail dies during the life of tenant for life, and then tenant for life dies, the issue in tail may enter, because this the discontinuance is at an end, by the death of tenant for life; and the grant of the reversion being secret, must be intended to pass no more than it lawfully might pass, unless it were executed by entry into the possession; for since it operates only as a grant, it must be only intended to pass the reversion during the life of tenant in tail, which he had a lawful power to grant, and not establish a right of propriety distinct from the right of possession. But if a man had thus granted the reversion, and tenant for life had died, and then the grantee had entered by force of the grant, and the tenant in tail had died, this had worked a discontinuance; for the grantee's entry works a second notoriety, which plainly manifests a discontinuance of the intire fee-simple. But it may be asked, why such

Of discontinuance.

such grant operates by the subsequent entry, to pass more than it lawfully may pass; for if the grant and attornment only operates to pass a rightful estate, why doth the subsequent entry, in pursuance of such grant, make it pass a wrongful one? The answer is plain; the grant and attornment of tenant for life passes the new reversion depending upon that estate for life. But since grants in their own nature are secret, and therefore pass no more than they lawfully may pass, it follows that this grant and attornment alone cannot pass the reversion, so as to disinherit the tenant in tail: But if it be executed by entry, then it will; for the entry is a notoriety, that the grantor intended to perpetuate the discontinuance, and to continue a right of possession distinct from the propriety, and must be equal to a second feoffment; which he might make when tenant for life dies, during his life; but if he had died before tenant for life, he had not been capable of such feoffment, and consequently of no discontinuance that is tantamount; for the grant and attornment of tenant for life shews an endeavour to pass the new reversion, and the entry in pursuance thereof must be to all manner of purposes tantamount to a new feoffment, and therefore

fore continues the right of possession distinct from the propriety, and is by the law construed not to operate as a grant meerly, but taking the acts most strongly against the parties, it is interpreted to operate as a feoffment.

If tenant in tail infeoffs him in the immediate reversion or remainder, this operates as a surrender, and therefore passes no more than it lawfully may pass, and consequently works no discontinuance; but if the feoffment were to the more remote reversioner, or to the immediate reversioner with any other, it is a discontinuance, because it cannot be interpreted to operate as a surrender. Sect. 625, 6.

Are all instances in grants that work no discontinuance, *causa qua supra*, *sect.* Sect. 627, 8, 9, 630, 1, 2.
633, 4, 5. If an infant husband aliens the wife's lands, this works no discontinuance, but the wife after the death of her husband may enter; for the infant had no disposing power, and therefore could not part with the right of possession, but so as he might lawfully assume it whenever it appeared to be for his benefit; and if the right of possession was never parted with, after the death of the husband it is in the wife, and she may enter and defeat such alienation, since it was never absolutely parted with at the time of such alienation.

My

Sec. 636.

My Lord *Coke* is of opinion in this case, that by such surrender to the second husband the discontinuance is taken away; for by the surrender the estate for life is drowned, and then there is no alienation in being to work a discontinuance; for the surrender of the estate to the second husband is a giving up the estate, and not an assignment of it over.

Sec. 637, 8, 9.

It is to be known that tenant in tail has the right of possession inheritable, and therefore he may discontinue the same in fee by his feoffment, because since he has an inheritable possession, it follows of consequence, that he may alien it without any disseisin to any person; but if he only makes a lease for life, he executes but part of his power: for since he had a possession inheritable, he from that possession has privilege to alien in fee without disseisin to any one; and therefore after such lease for life he grants the reversion in fee, and tenant for life attorns; and after tenant for life dies, and the grantee of the reversion enters in the life of tenant in tail, this is a discontinuance of the fee; for since he had originally an inheritable possession, this is an execution of the farther remaining part of his power, and amounts to an alienation of the fee by a second feoffment; for having originally an

an inheritable possession, he might discontinue the same in fee; and when he executes but part of his power, the rest remains in him; and therefore, if he has afterwards opportunity in his life, he may execute it by a second alienation. But if tenant in tail makes a lease for life, and dies, and the issue grants the reversion, and the tenant attorns, and then tenant for life dies, and the grantee enters, and the issue in tail dies, leaving a son; this is no discontinuance, but that the son may enter; for the issue in tail had no inheritable possession in him, in as much as the right of the intail only descended on him, and not the possession; and therefore he could not have any power to alien a right of possession that was never in him; and consequently his grant, when he never had any original right of possession, by virtue of such entail, doth not discontinue the right of possession, so as to bar the son from his entry. So if tenant in tail makes a lease for life, and then grants over the reversion, and the tenant for life attorns, and then the grantee grants over, and the tenant attorns to the second grantee, and dies, and the second grantee enters in the life of tenant in tail, and then the tenant in tail dies, this is no discontinuance to bar the issue, but that he may

Of discontinuance.

may enter; because, though the tenant in tail had an original right to discontinue during his life, because he had the right of possession in him; yet the first grantee had no right of possession in him, nor ever was seised of the land by virtue of the entail, or otherwise; and since he never had the right of possession in him, he cannot alien the right of possession, so as to work a discontinuance.

Also 'tis to be noted, that if a man has the right of possession, and is not possessed by virtue of the entail, there he cannot work a discontinuance, unless by warranty; as if there be grandfather, father, and son, and the grandfather is seised in tail, and the father disseises the grandfather, and makes a feoffment in fee, and dies, this works no discontinuance, because the father was not possessed of the entail, but of a fee-simple by disseisin, which was subject to the entry of the tenant in tail, and consequently the alienee is subject to the entry of the issue in tail, in as much as the father, that made the alienation, had only the naked possession by the disseisin, and not the right of possession by virtue of the entail; but if the father had enfeoffed with warranty, this had been a bar, because the heirs in that case had been bound by contract to defend that

that possession, and therefore had been ever afterwards repelled from claiming it, if assets descended. But if tenant in tail makes a lease for life, and dies, and the reversion descends to the issue, and the issue grants the reversion with warranty, and tenant for life attorns and dies, and the grantee enters, and the issue dies leaving a son; this is no discontinuance, but the son may enter; for he is not barred by this warranty; for the issue in this case only transfers the reversion, and not the possession, or right of possession; and therefore the issue in this case is not repelled from claiming the possession, which was never transferred to the grantee, and to which the warranty was never annexed; for it were absurd to construe the warranty to extend to the possession of that which never was in possession, at the time when the contract was made.

These are spoken of in the Sect. next foregoing. *Sect.* 643, 4, 5, 6, 7, 8. *Vide* *Sect.* 640, 641, 2. in the Comment on *Sect.* 595.

If tenant in tail be disseised, and he releases to the disseisor all his right, this, as is said, puts the estate-tail in abeyance; because having past away all his right, he cannot have right contrary to his own release. If there be tenant for life, remainder in tail, and the tenant in tail

Sect. 649, 650.

Ld. Raym. 314.

Stra. 969.

tail releaseth to the tenant for life all his right, this had put the tail in abeyance; so that he could not afterwards have maintained an action of waste; but if the remainder had been in fee, and he in remainder had released all his right, the remainder still continues in the tenant in fee, and he may have an action of waste. And the reason of the difference is this, that when the tenant in fee releases all his right, he only confirms the estate to tenant for life, during his life; and for want of words of inheritance, it passes no farther interest; and therefore he has still a remainder depending on an estate for life, to which an action of waste belongs. But tenant in tail cannot, by the release of all his right, pass an estate during the life of the releasee, but only passes an estate during his own life; and therefore having put all his right out of him, he cannot bring an action relating to such right.

Of remitter.

THE notion of remitter stands on the principles we have already laid down; for either there is a naked possession distinct from the right of possession and propriety, or else there is a right of possession distinct from the right of propriety. Now where there is a naked possession, distinct from the right of possession and Propriety, as between disseisor and disseisee, where the entry is congeable; there if the disseisee takes back the possession from the disseisor, he is remitted. For it cannot be otherwise, that when he has taken back the possession, he should be seated in his old right; for he who has really the title, cannot claim from a disseisor that has no title at all; and it would be very absurd and unreasonable, that the disseisee by accepting his own possession, should transfer back any right to the disseisor. But where the disseisor transfers it back for life, or years, by deed indented, or by matter of record, there the disseisee is not remitted; for if a man by deed indented takes a lease of his own lands, it shall bind him to the rent and covenants; because a man can never

K

be

Ld. Raym.
13, 16, 1511.

Sect. 693,
4, 5.

be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. The same law, if it had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert.

Where the right of possession is distinct from the right of propriety; there, if the proprietary recovers the right of possession by agreement, he must hold it under such agreement; for the other having the right of possession, and transferring it to the proprietary, such proprietary must take the right in the same manner as the other has conveyed. For 'tis his own folly and laches, that he would contract about such right of possession, and not assert his propriety in a proper action; but when he has contracted for such right of possession, and such right of possession is transferred, he must keep to the terms of the bargain, and he leaves all the right in the feoffor he has not contracted for; therefore if tenant in tail enfeoff his heir of full age, and dies, he must hold it under the feoffment, because 'tis his own folly that he would take the right of possession in this manner, when he was entitled to the right of propriety after the death of his ancestor.

But

But where the proprietary comes to the right of possession, without any fault or folly of his own; as where the right of possession is cast upon him by the law, or he or she comes to the right of possession by feoffment, under age, or during coverture, where no folly can be imputed; there such proprietary is remitted and seated in his ancient and former right. For the eldest title being the more ancient, is the least subject to dispute; and therefore when the proprietary has in such manner acquired the right of possession, 'tis esteemed, for the repose of mens inheritances, to be only a restitution of the old title, and not the acquiring a new one; and the rather, because there is none against whom the action may be brought to regain the propriety. And when any person has thus acquired the right of possession, if any person will controvert it in any elder action, 'tis fit he should set up an elder title, that the meer right may be decided. Thus if the heir of the disseisor be disseised by the disseisee, he by such wrong and injustice cannot regain the right of possession; for an act of wrong can never gain any right; but if such disseisee die seised, then the heir has the right of possession; and having then both the right of possession and of propriety, he is seised

in his ancient right for the reasons above-mentioned.

Sect. 659.

If a man enfeoff an infant or feme covert, that has right of propriety, for life, for years, or on condition, they are remitted to their ancient right, and all such conditions vanish. For to a feme covert or infant no folly or laches can be imputed; nor can their acts turn to their prejudice; so that when they have acquired the right of possession, they are restored to their ancient right of propriety; and being not capable of contracting, the terms and conditions of the feoffment do not bind them. But if they were of full age, or discover, then they leave all the right of possession in the feoffor, that is not transferred to them by the contract, and must hold the right in the manner transferred to them. For since they have no right of possession but from their bargain, 'tis fit that they should hold according to such their contract; but in the other case, 'twas the folly of such parties to transfer the right of possession to such infants as were the proprietors, to hinder them from their actions. And this the turn of the chapter.

Of warranty.

Warranty, according to *Spelman*, is derived from the *Saxon* word *War*, as the *French* word *Guarranty* is derived from the word *Guer*, of the same signification; which plainly imports an undertaking to defend, and properly by arms, as in a writ of right they anciently defended them. For the warranty was an exprefs undertaking to do the same thing, as the feudal lords used to do to their tenants, and under the same penalties. And so this exprefs contract was to be of the same import, and to amount to a feudal contract; and for this the parties received a recompence, and that was generally in other lands by way of exchange, which descended to their heirs. L. Raym. 35.
ib. 360.
Stra. 414.

These warranties were introduced by the liberties of alienations that happened, according to *Spelman*, about the time of *Hen. 3.* when the *Saxon* liberty of alienation was revived; for then they used to alien to hold of themselves; and then they annexed a warranty, and thereby were called in to dereign the warranty of such feudal lords, in whose homage they were, and did not permit them to alien.

Of Warranty.

Also such exprefs warranties were used to be given when the lords aliened their seignory; for where the old lord was bound by his old feudal contract to warrant, this did not extend to an assignee, without it had appeared to have run in that manner in the old deed, which was often worn out and lost, so that the feudal tenure did totally subsist in prescription; and therefore the tenants would not attorn to destroy the warranty on which their homage ancestrel was founded, without a new exprefs warranty from their new lord.

L. Raym.
360.

After the Stat. of *Quia emptores*, they used to continue this way of conveyance by warranty, 'till they came up to the old tenants that held by the homage ancestrel; so that warranty became frequent in all conveyancing. And they were contracts that had all the import and effect of a feudal contract, which were anciently made between the lord and tenant for their mutual defence. For, *first*, they rebutted such warrantor and his heirs from claiming any right in the land; and as in the homage ancestrel the rule was *homagium repellit perquisitum*, so the exprefs warranty repelled the ancestor from claiming, and not only him, but the heir, though the right were not in the ancestor.

ancestor. And as in homage ancestrel, where the heir received homage, he could never set up a title to the land itself; so here in the express warranty, the heir was presumed to receive a recompence, and therefore was barred if he did not claim during the life of his ancestor; and this was the more reasonable, because such recompences were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of the ancestor; otherwise he could never claim it, in as much as this was the whole time of limitation for the heir to challenge his own in this case. And if he slip'd that time, he was barred for ever, in as much as there might be secret conveyances to alien the recompence for the benefit of the heir, which might turn to the prejudice of the purchaser.

But tho' the warranty barred the right of entry or right of action in the heir, yet it did not bar a title of entry for a condition broken, mortmain, forfeiture, escheat, or the like. For the feudal contract only barred all the right to the lands themselves, in the lords themselves, as is said in the homage ancestrel; but it did not bar his title of entry for condition broken, forfeitures, escheats of such

Of Warranty.

tenants, or the like. And the express warranty could go no farther than the warranty implied in the feudal contract, since it came in the place of it. If the warranty attaches in the heir that has right, during the continuance of the estate warranted, he is for ever barred to claim it, not only against the warrantee himself, his heirs and assigns, but against a disseisor, abator and intruder, recoveror, *cestuy que use*, lord of the villain, lord by escheat, or any other person coming-in in the *Post*; because the heir is presumed to have received a recompence, and therefore cannot have the land it self, no more than when he has received homage from an heir that holds by homage ancestrel, can he claim the land it self. But if the warrantee's estate be recovered by elder title, then the heir may recover against such recoveror, though the warranty were attached in such heir; an example of which see *sect. 741*. because the recompence descended to the heir stands precarious from the time that the recovery was had; for the warrantee, if he pursued his writ of *warrantia chartæ*, might recover the lands descended to the heir, and therefore the heir is at liberty to pursue his action against the recoveror, But if the estate of the warrantee be defeated

feated by any person that comes-in in the *Post*, before such warranty attaches in the heir, there the heir may enter upon such person in the *Post*; as if the lord by escheat, or the lord of the villain enters before the descent of the warranty, there the heir may enter on such lords; for when the estate warranted is taken away, before the recompence descends on the heir, the heir has title, because when the estate warranted is destroyed, the ancestor is not obliged to continue the recompence to descend to the heir, but he may alien it; therefore it is not necessary to be presumed, that any recompence descends to his heir, or consequently that the heir should be barred in this case, no more than a lord is barred from entering on a disseisor of his tenant before he has accepted the homage from him, which is the recompence for the land it self. But if the same estate continue, to which the warranty was annexed, though in other *lands*, yet the heir is barred; as if a man makes a warranty to *A.* and his heirs, and he aliens to *B.* and then the warrantor dies, the heir is barred from entering on *B.* because the same estate continues, though in other *hands*, to which the warranty was first annex'd; and therefore it is presumed in justice that the warrantor

Of Warranty.

warrantor left a recompence to descend to the heir; for *B.* may have a warranty, and vouch *A.* who may vouch the warrantor and his heirs to recompence. So *cestuy que use* seems to continue the estate of the scoffees, and the warranty transferred by the statute, and therefore a recompence is presumed to descend to the heir to answer it.

The second operation of the warranty was by way of voucher; for, as in the feudal contract the tenant vouched the feudal lord to defend his possession; so in the express warranty, the purchaser vouched his warrantor, who took the defence of the estate upon him; and as no man could vouch the lord but the tenant, so no man could vouch the warrantor but he that brought himself within the words of the contract, because there was no contract to defend the possession to any body else. But as the lord, by acceptance of homage from the disseisor, was barred from claiming the lands; so the warrantor, having received a recompence, was rebutted from claiming the land itself.

The third is by writ of *warrantia chartæ*, which also could only be brought by the party to such contract; for the tenant by homage ancestor might have had his *warrantia chartæ* against his lord,
to

to subject the lands of his lord to answer the feudal contract. And when the assise was invented, in which a man could not vouch; and when also by *West. 1. c. 40.* a man could not vouch out of the degrees, unless in both cases the party was present; *vide Booth 278.* then this writ came more into use; and upon such actions, where they could not vouch and have process *ad warrantizandum*, they requested a plea, and the same was done in the case of express warranty. But it is to be noted, that in case the warrantee is impleaded, he must request a plea; and when he has so done, he may bring his *warrantia charta*, and recover at any time till execution actually executed. But if he be turned out of possession, then he can have no *warrantia charta*; for the warranty in the feudal contract is to the tenant, and in resemblance thereof, the express warranty is only to the tenant of the land. *Hale's Fitz. 135.*

The words that create a warranty were first anciently the reservation of homage, for the reasons given in homage ancestor, as plainly appears by the statute of *Bigamis: Vide 275, 276.* Secondly, the word *Dedi*, to hold of the donor and his heirs; for when such tenure was created by the said words, it was

Of Warranty.

was supposed that the services reserved were a perpetual recompence for such tenure, and therefore such warranty was perpetual. Thirdly, *Dedi*, to hold of the lord of the fee, was settled by the statute of *Bigamis*, c. 6. to contain a warranty, during the life of such donor; because the lord might avow upon his old tenant that was already in his homage, during life; and therefore against the tortious entries and distresses of the lord, it was necessary that he should be protected; and it was also thought then a point of honour that no man should see his own gifts invalidated without entering into the defence of them; and anciently perhaps being taken into the lord's homage created warranty. Fourthly, By the word *warrantizo*, which contains as express a warranty, as if there had been an homage reserved to the warrantor, *sect.* 733. Warranties at common law are of two sorts; first, those commencing by disseisin or wrong; and secondly, binding warranties. The first are where the ancestor that makes the warranty, is partner to the wrong, and such warranties are not obliging; because it cannot be presumed that one who is so unjust as to do wrong, will be so just as to leave a recompence to his heir; wherefore such contracts are wholly rejected as collusive,

Ld. Raym.
860.

collusive, and founded on no consideration. All other warranties were binding at common law; for a recompence was presumed to be given, which was then either in land, by way of exchange, or in money, which was turned into land, and descended to the heir; and therefore the time of limitation for the heir to claim was during the life of the ancestor; otherwise the estate of the purchaser, which subsisted on the warranty of the ancestor, should never be defeated by such heir that ought to defend it; and if such warranties were not binding, there might have been many secret conveyances for the benefit of the heir, to defraud the purchaser. And in that age, when the building up of families, and establishing them in seats and tenures was the whole business of the times, they presumed that no man would destroy his heir's right for his own present advantage. As to these binding warranties, there are some altered by the statute: The first statute is that of *Glocest. c. 3.* which says, that tenant by the curtesy shall not, by his deed with warranty, bar the heir of the land descended to the mother, further than assets descend from such father; for the estate being created by the law only for life, it was fit to prevent such father from grasping the fee.

If

Of Warranty.

If assets descend from the father, by the express meaning of the act, the purchaser shall retain so much of the land of the mother. But if lands afterwards descend, such purchaser must plead the warranty, and may have a *scire facias* for so much of the same land, as assets shall afterwards descend, in lieu thereof.

The next statute was that of *Westm. 2. De donis*, which took from tenant in tail the power of alienation. Now this first formed the distinction between the lineal warranty and collateral; for before that statute all warranties were binding to the heirs at law, as well where a man had title to the lands, as where he had not; for after such warranty and acquiescence, a recompence was presumed to descend, instead of the land itself.

But the statute *De donis* only barred the alienation of tenant in tail; therefore the lineal warranty was within the statute, but the collateral warranty was left as it was by the common law; but the difficulty is to observe how the distinction arose between the lineal and collateral warranty; and for this we must go back to the considerations already mentioned, touching the alienations. First, Originally the person aliening consulted his lord, and a fine for alienation was paid,
and

and the alienee was received into the homage, and consequently into the warranty of the lord of the fee. Secondly, Towards the latter end of the barons war tenants began to alien to hold of themselves, to save the fine, and then they made express warranties in such conveyances, to bring the feoffor into the defence of the land, who brought in the lord of the fee; and this was confirmed by *Magna Charta*, so there was enough to answer the lord's distresses; but sometimes they then aliened to hold of the chief lord, and then the lord might have taken the feoffor that was in his homage, for his tenant during life; but afterwards could not avow upon his heir that never was in his homage at all; and therefore was obliged to take the alienor after the death of the alienor. But, before they were taken into such lord's homage and warranty, they used to agree for the fine; and therefore in such cases the warranty by *Dedi* was during the life of the warrantor. Thirdly, To quiet disseisins, that were usually very frequent in those unsettled times, between neighbouring feudaries (and from thence called deadly feuds) it was usual for such disseisors to purchase warranties from some ancestor of the family; and this gave a right to such disseisor;

Of warranty.

feisor ; for it might be easier to compound with the ancestor, than with the party to whom the wrong was actually done ; and then to quiet mens possessions such warranty bound, if the owner acquiesced under his expectations from such relations. Fourthly, The next step was on the statute of *Quia emptores*, when they aliened to hold of the chief lord, and the lord being then compellable to receive such persons into his homage, was not obliged to warranty. Upon the first three points the law had stood at the making the statute *De donis*, which was only a general appointment that the will of the donor should be observed ; so that the tenant in tail should not alien to the disinherittance of the issue, and of him in reversion. But it was left to the king's courts to mould such estates, and to make rules and orders to prevent such alienations, and none were more necessary than to restrain these warranties. The first order or rule that was taken in this case was, that the warranty of tenant in tail, or of any person in title under the tail, should be no bar, unless assets descended. This was made according to the platform of the statute of *Glocester* ; for they thought it was equal to make the same rule as to tenant in tail, as they had made in parliament

liament for tenant by the curtesy, viz. That the warranty should be no bar, unless the warrantor left an equivalent estate to descend; but if no assets descended in the case of tenant in tail, they might have a *scire facias* for the assets, and not for the land intailed. But in the case of tenant by the curtesy the *scire facias* was for the land, on the part of the mother, which was the very land aliened, and not for the assets descended; and the reason of the difference was, because if the *scire facias* had been for the land intailed, then if the assets had been aliened, the issue in the next descent might have come again with hisformedon, 1 Inst. 366. and not only tenant in tail himself, but all other persons lineal in that title were debarred from making such warranties; for the estate-tail was designed by the act to continue to all generations; and if they had permitted the next heir, though he was not in possession of the tail, to have barred it by his warranty, then might the father and son by their warranty have barred the tail, and destroyed the perpetuity the statute designed. The second order was, that the collateral warranty was not within the statute; for the statute only appointed that the will of the donor should be observed,

L

that

Ld. Raymond
360.

that the tenant in tail should not alien to disinherit his issue, which they extended to all lineals, for the reason aforesaid; for otherwise the will of the donor could not be observed. But they could not in any manner of reason extend it to collaterals that were not to take by the gift, and therefore could not be forbidden to bar by their warranty. Again, It would be very hard to appease the feuds and disseisins touching estates-tail, if the ancestor could not bar it by collateral warranty, which of old commonly ended such contentions. Nor could there be any exchanges by any ancestors of the family, in order to better the estates of the issue, if such collateral warranty were not a bar. And they did not in this case oblige the tenant to shew assets; for assets were presumed, as it was before, if the whole matter was transacted during the life of tenant in tail; and he did not enter to disannul it; therefore according to the text, *sect. 708.* if the tenant in tail discontinue the tail, and die, leaving three sons, and the middle son releases with warranty to the discontinuee, this is a collateral warranty to the eldest son, and lineal to the youngest, *causa qua supra.*

If

Of warranty.

147

If land be given to a man, and the heirs male of his body, and for default of such issue, to the heirs female, and hath issue a son and a daughter, the son may bar the daughter by his warranty, *sect.* 719. because the son is not lineal in the tail, *quoad* the females. And the rule of the court only extends to lineals barring their subsequent heirs; and they made no rule in relation to collaterals, but they were left as they were at common law; for they thought that the alienations were sufficiently prevented, if all persons that came in of the same tail were prohibited from barring their issues, or joining in any warranty to defeat such tail; but as to those that were not seised by force of that intail, there was no reason to nullify their warranties to maintain the will of the donor, since they had no interest in such gifts, and therefore were not obliged by the words thereof to maintain it; and therefore the son, that had no interest in the intails *quoad* the females, might bar it by his warranty.

Now in the homage ancestrel the lord was obliged to defend his tenant, and find him a champion, if he were impleaded; for if it had not been so ordained, all those tenures would have been precarious,

L 2

because

Of Warranty.

because the tenant having no feudaries, could not himself have defended it. So in the express warranty, in respect of the recompence given, the warrantor and his heirs are obliged to defend the land, and to find a champion where the trial was by battail.

It is also to be noted, that if an infant be disseised, and the ancestor of the infant releases to such disseisor with warranty, and dies during the nonage of the infant, this is no bar; but if such ancestor releases during the nonage, and after the infant comes of full age, and then such warranty descends, then is the infant barred; because where the infant has the right of possession, no laches can be imputed to him, nor is he a competent judge of what is a sufficient recompence; and therefore his acquiescence cannot be construed to his prejudice; and therefore he ought not to be barred, if he doth not enter during his minority. But if only a right of action descend to the infant, then he is barred by the collateral warranty of his ancestor, though it descends during his infancy, because then the infant has only a right of propriety; and such rights are recovered in real dritural actions, where battail is joined, and then

then the parol must demur till the infant comes of full age, because the infant cannot fight himself, as the method was anciently among those barbarous nations. Nor can he appoint a champion during his nonage; and when he comes of full age, he must be barred, because he ought to defend the lands to the tenant, and to procure him a champion; and therefore to such rights of propriety the warranty is a bar, though it descend during his infancy. *Señ. 726. Co. Lit. 380.* If an ancestor devise lands deviseable with warranty, as in *señ. 734.* such warranty doth not bind, because the estate begins after the death of the ancestor, and consequently there can be no laches in the heir, since the warranty did not commence till after the decease of the ancestor; and therefore there is nothing to be presumed from such acquiescence.

Secondly, There can be no recompence given by the ancestor, since the estate begins after his decease. Thirdly, There are no parties to such contract; for the ancestor is not in being at the time when such contract has force, and the heir is not party thereunto. But if a man warrants the land in fee, and takes back an estate for life, as in *señ. 744.* this doth

Of warranty.

not destroy the warranty, because here a recompence is presumed to be given for the whole fee; and there was laches in the heir for not claiming it during the life of the ancestor, and there was a party to such warranty, at the time the contract had its being. The warranty, like all other contracts, may be released and discharged; and if the warrantor be attainted, so that he can have no heirs, no man can be barred by force of such warranty; because in these cases there can be no recompence presumed to descend to the heir.

Vide sect. 785, 6, 7, 8.

Of homage ancestrel.

THE old authors, that have best explained our *English* law, tell us, that there is a mutual bond between lord and tenant. *Tanta and talis connexio inter Dominum & tenentem quod tantum debet Dominus tenenti, quantum tenens Domino, præter solam reverentiam.* So that as the tenant was bound to defend the lord, so also the lord in his turn was bound to defend his tenant. And anciently, when their way of trial was by battail, such a connexion was absolutely necessary; because if the lord was impleaded, it was necessary he should have champions in the trial by battail, to make out his right; and therefore the tenants were the lord's champions, who were obliged to be freemen; for the ancient form was, that they should defend *per corpus liberi hominis*. Now when the tenant was impleaded, who did not thus retain champions, he used to vouch his lord to defend him by his other freemen. Now this warranty, in the ancient tenures, had three effects. First, To rebut the lord and his heirs from claiming any right to the land; for the homage in those

Of homage ancestrel.

times was thought an equivalent to the land itself; because the lord had such an addition of strength and honour from the service of his tenant, that it was more to their reputation and defence, than the having the possession itself; and therefore the ancient maxim was *quod homagium repellit perquisitum*. So that if the elder brother had enfeoffed the second, reserving homage, and had received homage; and then the second brother had died without issue, it should have descended to the youngest; for *nemo potest esse tenens & Dominus, & homagium repellit perquisitum*. And the law seemed to incline that the lords, upon no pretence of right; might enter upon their tenants, and use the great power they then had to their oppression. So that if the lord had accepted rent from the disseisor, he could not afterwards enter for an escheat, tho' the disseisee died without heirs. But if a disseisor comes in above such tenancy, and without such acknowledgment to the lord; then it seems the lord, if he hath right, may enter, and is not repelled by his own homage from asserting such right; but though the lord's accepting homage from the disseisor barred him from any right to the land, yet it did not bar his title of entry for a condition broken or forfeiture,

Of homage ancestrel.

153

forfeiture; or on the escape of such disseisor; for he took it under the same feudal conditions as the disseisee had it, of which see more in title *Warranty*, and title *Releases*, that enure by way of extinguishment. Secondly, As the feudal contract repelled the lord from claiming; so in case any stranger claimed, the lord was vouched; and if he did not defend the tenant, he recovered in recompence against him; and this was, that the tenant in the lord's homage might have a quiet possession, and the lord might not abet any third person to overthrow his title, and therefore the champions of the manor were brought in to defend the title of the tenant in question. Thirdly, By writ of *warrantia chartæ*, and this the tenant by homage ancestrel had, as well as the person that had an expresse warranty. *Hira. Nat. Brev.* 134. for the feudal charter was the foundation of such writ, and therefore the writ runs *unde chartam habet* at this day; and upon such writ he may give the homage ancestrel in evidence; for the prescription supplies the place of a charter lost and worn out by age. And note, that in these actions of *warrantia chartæ*, and by voucher, he shall recover in recompence any land that the lord had; but otherwise it is an expresse warranty; for

Of homage ancestrel.

for there he shall only recover the land descended; and the reason of the difference is, because when the old feudal contracts grew to be immemorial, they could not distinguish which lands descended from the ancestor that made the grant; and therefore all lands were liable to such feudal contract, lest the tenant should be ousted of his defence. This sort of tenure has been totally destroyed by the free liberty of alienation; for before the statute of *Quia emptores*, the lord used to license an alienation; and they then seemed to succeed into the same homage, and to have had the same defence from the lord; but when the statute of ——— came that gave tenants a free power of alienation, the tenant used to alien with express warranty, and so they used to dereign the lord's warranty; and when the lord aliened, they used to have an express warranty from their new lord; otherwise they would not attorn; and if they did, it was reputed their own folly.

PART II.

O F

Customary and * Copyhold

T E N U R E S.

+ **T**H^O a copyholder has but an ^{4 Co. 21. a.} estate at will, yet it is in this ^{1 Stra. 452.} different from other estates at will; that it doth not determine upon the copyholder's death, but descends to his heir, if

* Tenants by the verge, are but copyholders; and have no other evidence but by copy of court roll. But they are so called, because when they surrender, they deliver a little rod into the steward's hand, who shall deliver the same rod to him that takes the land in the name of seisin. It may be any other thing as well as a rod, according to the custom, as a single penny, a glove, &c.

Copytenants, copyholders, or tenants *per copy*—*d'ancien temps fuer' appellees tenants en villenage*—*et ceo appiert per les aunciennes tenures*, &c. F. N. B. 12. c. Bro. tit. Villenage 63.

Tenants

if it be any estate of inheritance. The reason of this seems to be, because upon copyhold estates villain tenures were usually reserved, and these estates were given to villains; therefore no other estates could be granted to them but at will; for otherwise they had been enfranchised, as it seems. But to prevent the frequent ending of these estates, they granted them in fee, but yet at the will of the lord; and according to my lord *Coke*, notwithstanding such grant, they were entirely at the will of the lord, who ousted them when he pleased, without any reason; which being a very great inconvenience, it seems it was altered by some positive law (though that does not appear) which preserved their estates to them, doing their services, but yet left them as it found them, to have estates only at will. *

Ld. Raymond
44-
P.N.B.12.c.

Tenants at will, by copy of court roll, being in truth *bondsmen* at the beginning, but having obtained freedom of their persons, and gained a custom by use of occupying their lands, they are now called copyholders, and are so privileged, that the lord can not put them out, and all through custom. *Bacon's use of the law* 43.

† The copyholder may justify against his lord, but so cannot a tenant at will; and he shall have the aid of his lord in an action of trespass. 1 *Leo.* 4.

* Copyhold lands are parcel of the manor itself, and not held of the manor. 1 *Ld. Raym.* 44.

A copyholder cannot transfer his estate 4 Co. 21. a. but by surrender; the reason is, * because he has only an estate at will, † which is determined when he takes upon him to grant it over; ‡ for that is a plain declaration of his intent, || that he designs to hold the land no longer; so that he must : Inst. 57. a. surrender to the lord, and then he may grant another estate at will, which now the lord is compellable to do to him to whose use the surrender is made. Because the copyholder now has that settled interest and estate in the land, that his heirs shall inherit the land, whether the lord be willing or not; and so a copyholder hath power over his estate, and not the lord; therefore 21 Ed. 4. *Brian* said, : Inst. 60. b. that if the lord enter upon his copyholder, he might have trespass. So far is it now from being a determination of the copyholder's estate.

* And another reason of a surrender is, that the lord should not be a stranger to his tenant.

† If a surrender be defective, a court of equity will relieve. *Mich. 10 Geo. 1725. Ch. Rep. 75. Ch. Cases 254. 1 Vern. 69.*

‡ The lord is not compellable to make a surrender. *Moor 1088. Lord Grey's case.*

|| In what cases copyhold estates may be transferred without surrender. *Hely 150. Winch 3.*

Copyhold estates are within all the statutes of Bankrupt. *Cro. Car. 550, 569. 1 Keb. 24.*

4 Co. 21. b.

A copyholder in fee may surrender, reserving rent, with a condition of re-entry for non-payment, and he may re-enter for non-payment; for having a fee-simple according to the custom of the manor, he may reserve what profits he pleases out of it, by the same reason as he may dispose of it as he pleases. And since by custom an estate at will is descendable, the descent is ordered and governed by the rules of the common law.

Crook Eliz.

361.

Id. Raymond

630.

Ib. 1145.

For those reasons that govern the descents at common law, are drawn from the nature of descent and disposition of estates after the owner's death; and are grounded upon those reasons that seem to warrant such a disposition of the estate, and are not taken from the nature of the land or thing that is disposed of, and therefore may as well, and with as good reason, be applied to the disposition of copyhold as freehold estates; since it is not the nature of the thing disposed of, that is to rule or govern either in one case or in the other. And therefore, where a copyholder by licence made a lease for years, and the lessee entered, and the lessor died, having issue a son and a daughter by one venter, and a son by another, then the eldest son dies: Adjudged, that the daughter of the whole blood shall inherit; because

4 Co. 23. 3.

The like case of a guardian.

Dier 292. a.

Cro. Car. 411.

cause the possession of the lessee for years was the possession of the elder brother, who may have possession before admittance; for in that case he was not admitted; for if it be reasonable in such case at common law to keep the inheritance out of the half blood, so it is in copyhold estates. But if the brother do not get possession, the sister cannot inherit; for then he hath only a right to the lands as representative of his father, which right she is not capable of having, because she is not representative of the father. But when he has gotten possession, he hath then an estate in the lands descendable to him and his heirs, and the sister is his heir; and though he has the lands as representative of his father, yet he hath them to him and his own representatives. But when he never got possession, he never executed the power he had of taking the lands to him and his representative; so that this power devolves upon the younger son as representative of his father; for the law gives the estate to him and his representative, who is representative of the dead person. Now when he that is representative to the dead person, doth not get actual possession, and so vest the estate in him and his heirs, he hath no power over the lands, and therefore can
make

4 Rep. 21.

1002
1003

Of customary and

make no lease or disposition of them by feoffment; because though he hath a right to be absolute owner of the lands, yet is he not actually so till entry, because till then in fact he hath no possession; and therefore there is no reason by a fiction of law to create him a possession. And so he never having had the lands to him and his representative, he must take that is representative to the dead person, which is the younger brother; and this also may be a reason why he that claims by descent, must make himself heir to him that was last actually seised of the freehold. But though copyhold land be governed by the rules of the common law, concerning descents, yet it partakes not of the nature of freehold land in other respects. * For it is not assets in the heirs hands, neither shall a woman be endowed, husband tenant *per curtesy*, unless by special custom; † neither shall a descent toll an entry. The reason seems to be, because the estates of copyholders were at first only estates at will, and at the absolute dispo-

4 Co. 23. a.
30. b.

* Nor are they within the statute of *Westminster*, the 2. c. which gives *eligits*. *Savil's Rep.* p. *Heydon's case*.

† Nor are they forfeited by outlawry. *Lit. Rep.* 234.

tion of the lord; and there hath not since been any provision made for those particular cases. For my lord *Coke* says, 4 Co. 22. a. that copyholders have only a fee-simple *secundum quid*; that though they are tenants at will, yet their estates shall descend to their heirs, and not be determined by their death; and not be subject to the will of the lord, as other estates at will are (which it seems was introduced in favour of them by some positive law, tho' no footsteps of it appear now); but not *simpliciter* to have all the collateral qualities of estates in fee-simple at common law, in which respects that positive law seems to have left them at large as before.

My lord *Coke* says in his Copyholder, Co. Cop. 114. that if the lease for years determine, and the elder brother die before entry, that the younger brother shall inherit; for when he has once got possession, which he had by the possession of his lessee for years, then it seems he has made the estate descendable to him and his heirs. But perhaps it will be said, that the possession of the lessee for years is only the possession in law of the brother, and not in fact, because he can get no possession; and it would be inconvenient to carry the estate to another family, if the elder brother

M

ther

ther die before entry; but when this estate for years is ended, then since he may get a possession by entry, 'tis acquired by law. But then on the other hand, if by the possession of the lessee for years, he had an estate descendable to him and his heirs, how comes this estate to be divested by the expiration of the lease for years? 'Tis urged on the other hand, that possession was but feigned, and is now gone; * but yet if the brother were once in possession, and then were disseised, it seems the sister should inherit, though the possession of the elder brother were gone. But the possession of the lessee was the brother's possession only by supposition of law, to help him out where he could get no possession; and therefore when that estate for years is gone, the law removes the assistance it gave before, because now he may get possession, and so sets the matter between the brothers, as it would if there had been no lease for years. *Ideo quære de hæc.*

Dyer 291.
Moor 371.

4 Co. 22. b.
23.

† The heir before admittance may en-

* 2 Levins. 107. *Blackborn v. Greaves.* See *quære*
4 Leo. Case 226. 1 Ventris 260. 1 Mod. 102,
120.

† *Moor.* 596. 2 Gr. 105.

ter and take the profits; for perhaps there may not be a court holden in a great while afterwards. Such heir may surrender to the use of another before admittance, but not to prejudice the lord of his fine.

Quære, Whether the lord in such case must admit before the heir has paid his fine, and if he do, what remedy there is for the fine. 1 Leo. 174.

The admittance of tenant for life is the admittance of him in remainder, because they make but one estate; but the lord shall have a fine for the remainder-man's interest, but the remainder-man need not pay it till after the death of tenant for life, for then he becomes tenant to the lord. *Mich. 8 W. 3. in B. R. per Holt.* The admittance of tenant for life is the admittance of him in remainder, so as to vest the estate, but not to prejudice the lord of his fine; for after the death of tenant for life, he in remainder shall be admitted again. *Quære.*

'Tis enacted by the 31 H. 8. c. 13. That if any abbot, &c. shall make any lease of lands, &c. in the which any estate for life then was in being, then every such lease to be void. A copyhold was let for life by copy, and then the religious house granted a lease of it to an-

other for ninety years; and it came to be a question, Whether this was a void lease? And the doubt was, Whether a copyhold estate for life were within the words of the act, in which (any estate or interest for life, &c.); and it was resolved, that the lease was void, and that the copyholder had an estate or interest for life.

1 Ld. Raym.
132.

3 Co. 7.
Cro. Car.
42, 3.

Stra. 253,
258.

Stra. 516.
Ld. Raym.
1056.

And in the handling this case, some general rules were laid down for the exposition of statutes, where they should extend to copyhold estates, and where not. When a statute alters any interest, tenure, custom, service of the manor, or doth any thing in prejudice, either to the lord or tenant, there the general words of an act of parliament will not extend to copyholds; but when an act is generally made for the good of the common weal, and no prejudice accrues to the lord, &c. there copyholders are often bound. And this reason, as it seems, was the ground the judges went upon in the resolution before; for there was an act of parliament made for the king's advantage, to prevent the alienation of those lands that were to come into the hands of the king; and it was no prejudice to the lord to hinder granting future estates, so long as it permitted the granting present interests.

interests. * And in this case was something touched concerning the great controversy of entailing copyhold lands. And 'twas held *per tot. curiam*, that generally copyhold lands could not be entailed; because if the statute of *Westm. 2.* brings 3 Co. 8. in a new estate, as an estate-tail is, then it must introduce a new tenure, *viz.* the donee to hold of the donor, which comes within the rule before of a general act, not binding copyholders in such a case. Another reason was, because the words of the statute *de donis* are *quod voluntas donatoris*, &c. so that what may be entailed within that act of parliament, must be given by charter in tail; and copyholds are not given by charter in tail, but by surrender and admittance. That a sur- Cro. Car. 45. render and admittance is no alienation by deed, see *Litt. sect. 74.* For 'tis there said, an alienation by deed is a forfeiture. Again, that copyholds cannot be entailed, Cro. Car. 43.

* About the latter end of the reign of queen Elizabeth, the question was debated, Whether copyhold lands could be entailed. *Vide Cr. Eliz. 308, 907. Moor 753. Godbalt 358, 367. Cr. Car. 131, 411. 2 Roll. Rep. 383. Wm. Jones 360.*

And in *Hill and Morse's* case, it was adjudged, that where a copyhold is entailed, it must be by a special custom so to do. *Moor 188, 637. 1 Lev. 136. Raymond 164. Sid. 314.*

Of customary and

was also resolved in the case of *Rowden* against *Malster*. In both these cases 'twas objected against entailing copyhold lands, that it would introduce a perpetuity, because no fine or recovery could be suffered of them; and so the owner cannot dispose of them. Thus far then went the resolution of the courts in both cases; that copyholds are not generally within the statute *De donis*. But then when 'twas objected by some, that where there hath been a custom for entailing copyhold estates, there the statute *De donis* co-operating with the custom, should extend to it. But the lord chief baron answered that 'twas all one, and that no custom could make the statute extend to copyholds; because all the estates at common law were fee-simple, as *Litt.* says; and so there could be no custom to entail copyhold lands before the statute; and since there could not be; because no estate in copyhold is grantable, but what hath been grantable time out of mind; and the statute *De donis* is within the time of man's memory. But this was not the resolution of the court, but only my lord chief baron's opinion. In the case of *Rowden* ver. *Malster*, a copyhold was surrendered to the use of the copyholder's will, who devised it to J. in tail, remainder

Cro. El. 717,
907.
3 Co. 8.
Moor 358.
Lit. sec. 13.

Pro. Car. 44,
5.

der to *H.* in tail, &c. *J.* hath issue, and surrenders to the use of his wife for life; 'twas adjudged, that since the jury found 'twas not the custom of the manor to have an estate-tail in a copyhold, that *J.* had a fee-simple conditional; and that by his having of issue, he had performed the condition, and the surrender to the use of his wife was good.

One argument against copyholds being entailed was, that no fine could be levied, or recovery suffered, because a warranty cannot be annexed to an estate at will. There's a case cited in *Podger's* case, where 'tis said to be adjudged, that copyholds are not within the statute *De donis*; but it doth not say, if they be entailed by custom, they are not within the statute. Cro. El. 391.
9 Co. 105. a.

There is the case of *Erisb* ver. *Rivet*, Cro. El. 717. where 'twas adjudged, that without a custom copyholds can't be entailed by the statute *De donis*. These are all the cases that I can find against entailing copyhold lands; none of which go so far as to say, that if there have been an estate-tail by custom, that 'tis not within the statute *De donis*; but only the opinion of my lord chief baron, which will be but of little weight when we have seen the precedents against this opinion, which I shall now examine. And First, There is *Littleton's*

opinion for the entailing of a copyhold; for he says, that tenant by copy of court-roll is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind; That certain tenants within the same manor have used to have lands and tenements, to have and to hold to them and their heirs, in fee-simple or fee-tail; so that there he says expressly, that estates-tail in copyholds have been time out of mind, and therefore must have been before the statute. But my lord *Coke* in his comment on *Littleton*, in another place says, that an estate-tail may be, by the opinion of *Littleton*, by the custom, the statute co-operating with it; for saith he, there can be no estate-tail in copyholds by custom only, nor no estate-tail by the statute only, but the statute must co-operate with the custom. Now the question will be, How this can be reconciled with what *Littleton* says? For he says, That an estate-tail in copyholds was time out of mind of man; and then if estates-tail were before the statute, the question is out of doors, whether a copyhold can be entailed by force of the statute; for if they were entailed at the common law, then as to them the statute is but in affirmance of the common law.

It

It seems the meaning is this, that Cart. 22. estates-tail were before the statute, as to the manner of limitation by the custom of some manors; as that an estate was granted to a man and the heirs of his body begotten, the remainder over to another; but that in other respects these estates were not estates-tail before the statute, as that the tenant should no ways alien to debar his issue, or them in remainder; or that if he made any discontinuance, they should have a formedon in descender or remainder; but these things were introduced by statute upon the estate, which was the same in limitation by the common law; and so the statute is said to co-operate to make an estate-tail; and this obviates the main objection against intailing copyholds by the statute, *viz.* That every copyhold estate ought to be grantable time out of mind; and if an estate-tail were introduced by the statute, then that estate was not grantable time out of mind; for if the estate-tail were, before the statute, the same in point of limitation of the estate, as it is now since the statute, then an estate-tail hath always been grantable time out of mind, though some other qualities are now annexed to that estate by act of parliament, which were not so before, and which may well be

Of customary and

be said to give the statute some share in the making those estates, since they are so very considerable. And that the qualities should be annexed to this estate by the statute *De donis*, is no ways unreasonable; for this act was made to redress a wrong at common law, and was for the general convenience and profit of the weal publick; and the bringing an estate-tail in copyhold lands within the statute *De donis*, is no prejudice to the lord or tenant, alters no tenure, estate or custom of the manor, which may any ways prejudice any body.

It is no proof of a custom time out of mind to intall a copyhold, that an estate hath been granted to a man and the heirs of his body, for that may be a fee-simple conditional; but it must be shewn that a remainder hath been limited over and enjoyed, or that the issue have recovered after the alienation of his ancestor, or the like.

Those that are against the intalling copyhold lands, say that the estate-tail of copyhold land mentioned by *Littleton*, must be understood a fee-simple conditional at common law, or else he contradicts himself; for he says in another place, that all inheritances at common law were fee-simple; but it seems that may

may be well enough understood of freehold estates; for one may lay a general rule for all lands, meaning freehold lands, which will not extend to copyhold lands.

As that distinction about intailing copyhold lands is taken by my Lord *Coke*, and so of great authority, yet it is not a single authority, but the same distinction is taken and allowed in many other cases. And first there is the case of *Gurfey* ver. *Sanderfon*, where it is doubted whether a copyhold may be intailed, no custom being found one way or the other; by which it seems plain, that if there had been a custom found, there had been no question but that it might have been intailed. But then there is the case of *Eriſh* ver. *Rives*, that an intail may be of a copyhold by custom, but not without it. There are several other cases warrant the same distinction, as in the margin. Thus you may see the reasons both for and against intailing copyhold lands.

It is made an objection against intailing copyhold lands, that thereby the donee must hold of the donor; and the donor being in the reversion, must hold of the lord; and so the change of tenants will not be so often; and if the donee commit any forfeiture, the donor must take advantage of it, which would be to the prejudice

Cro. El. 907.
Pl. Com.
Manſel's caſe.
2 Cro. El. 717.
Moor 173.
188.
Gro. El. 307.
149.
1 Leon. 175.
Pop. 128.
1 Sid. 268.
314.
Mo. 637.

Cro. Car. 45.

Of customary and

prejudice of the lord to have the tenure thus altered. To this objection I think it may be very well answered, That the truth of the case is not so; for the donee in tail doth not hold of the donor, but of the lord, as it seems every tenant for life doth of a copyhold; and this seems to be very reasonable; for a copyhold in fee-simple is not like other estates in fee-simple at common law, but they are only estates at will, and so he that is the actual tenant at will, is tenant to the lord; for it seems to me, that because they are but estates at will, there is no division of estates, but he that is actual tenant at will hath all the estate, and there is no part or parcel of the estate left in any body else; and that a tenant in fee-simple of copyhold lands is only he that hath such an estate at will in the lands, as, by the custom of the manor, is not to determine by his death; but that after his death his heir shall be tenant at will; so that when he grants away an estate for life, he has no estate in the lands left in him, but only a power of being tenant at will, according to the custom of the manor, when his tenant for life's estate is ended. And I take it, that in the mean time the tenant for life is tenant at will to the lord, and shall do the services; and if he com-
mit

mit a forfeiture, the lord shall take advantage of it. And to this purpose there is the case of *Borenford ver. Packinton*, 1 Leo. 1. where the custom of the manor was, that the widow should have her free bench; and it is there taken for granted that she shall hold of the lord, and be accordingly admitted tenant, and that the heir shall not be admitted during her life, which plainly proves that the course of tenure of copyhold lands is not like the tenure of freehold lands at common law; for in that case, at common law she should hold of the heir; and though in estates at common law the donee holds of the donor by the same services the donor holds over; because the statute creating a reversion in the donor, the judges made exposition according to the common law, that because a fee-simple conditional was held of the feoffor by the same services that he held over; therefore the donee should hold of the donor by the same services he held over; but at common law the tenant in fee-simple conditional of copyhold could hold of no body but of the lord; therefore they cannot hold of the donor that have now an estate-tail in copyhold lands, but according to the rule in expounding the statute *De donis*; viz. by the common law they must hold of the

the lord, because the tenant in fee-simple conditional of copyhold lands at common law held of the lord, and not of the surrenderor. In the supplement to my Lord

Cro. Car. 44. *Coke's* treatise of copyholds there is a case cited between *Lane* and *Hill*, where it is said, That when a copyholder makes a gift in tail, he hath no reversion but a possibility; and the lord shall avow upon the donee for the rents and services, and not upon the donor; and therefore it was there said, that he in reversion could have no formedon in the reverter.

Hob. 177.

1 Leo. 297.

3 Leo. 197.

1 Brown. 179.

A copyholder, by licence of the lord, makes a lease by indenture for twenty years, and then surrenders his estate by the name of reversion of one moiety to one, and another moiety to another; and it was adjudged the reversion passed, for the lease for years passed out of the estate of the copyholder, as well as if the lease had been made by surrender. It seems that which occasioned the doubt in this was, that the lease not being made by surrender, the lessor still continued tenant to the lord; and so whether he might surrender by the name of reversion was the question. This case seems very much to shake the reasons I have before given why the particular tenant shall hold of the lord, and not of him that created particular estates;

estates; that is, that there was no reversion left in him; but yet though such interest may pass by name of reversion (for any other name to give it will be very hard to find); yet perhaps he hath not in strictness such an estate in him. However that be, it seems the particular tenant holds of the lord; therefore if tenant in fee of a copyhold surrenders to one for years, it seems to me that the tenant for years shall hold of the lord; for by admittance the lord takes him for his tenant; but if the lease be made by indenture, there it seems he holds of his lessor; for he is not admitted tenant to the lord. It was held that no attornment was requisite, because it is the lord that has the power of chusing and admitting tenants, and not the lessee. It was held likewise, that the rent was to be divided by the halves according to the reversion. Having thus examined the reasons and authorities for intailing a copyhold estate, after which there can be no great reason to doubt, but that copyholds may be intailed;

It is now requisite that we see the method for the avoiding such intails; and first I shall shew, that a recovery with voucher doth not of common right bar the intail of a copyhold; but that as to the intailing them, custom is requisite; so without

Stra. 1197.
Recovery sans
custom bar e-
state-t. & fem-
ble reasonable,
car fuit nul
custom que
bar freehold
estate-t. Mes

Quere, car
estate-t. in
cop. est create
per custom.

1 Rol. Abr.

506.

Mo. 358. con.

Hob. 177.

4 Co. 27. b.

Cro. Car. 45.

205.

Mo. 358. con.

Cro. El. 391.

Cro. El. 372.

380.

1 Rol. Abr.

506.

Mo. 637.

without custom the intail cannot be cut off. The reasons are, that because without an intended recompence in value, no recovery shall bind, and the surrenderee comes-in in the *Posse*, by the lord, and is not in in the *Per* by the party, and so no warranty can be annexed to the copyholder's estate. Besides, they have only an estate at will, to which no warranty can be annexed of common right; for no estate less than a freehold is capable, by common right, of having a warranty annexed to it. And accordingly it was adjudged in *Clun's* case, and all the judges held that the recovery did not bind without a custom. But there is a *quere* whether judgment was given for the plaintiff upon the principal matter, or no; for it seems to have been a discontinuance, and then the defendant's entry could not be lawful. There are two other cases where this question came in dispute, but was not resolved. It is held, in the case of *Church ver. Wiat*, that a recovery by custom may bar, which implies, that without it it cannot bar. But in the case of *Oldcot ver. Level, Moor* 753. it was agreed that a recovery may be in the court of the lord, that will bar a copyhold; and there it is said generally, and is not put upon any custom.

It

It is debated, whether, if there be a custom to bar the issue of a copyhold estate by surrender to one in fee, whether that be good. *Moor* 188. *Numb.* 336. *Hill ver. Morfe.*

Now my lord *Coke* says, by custom, by surrender the entail of a copyhold may be cut off. It is held to be a good bar of a copyhold estate for the tenant in tail to commit a forfeiture, and the lord to seise and grant to another. Or if the tenant in tail surrenders to the use of the purchaser and his heirs, and the purchaser commits a forfeiture, and the lord seises and regrants; this is held to be a good custom to bar the estate-tail of a copyhold, though the tenant in tail be not privy to it. By this it seems plain that if tenant in tail commit a forfeiture, his issue is bound by it; but the lord can grant to no body else but to him that is intended to have the estate. Thus it seems plain to me, that as estates by the custom may be entailed, so by the custom also those estates-tail may be cut off by surrender, recovery, or forfeiture, according to the several customs of manors.

Having thus, in some measure, treated of the rules to know when the general words of an act of parliament extend to copyholds, and when not; and having

N

shewed

Mo. 638.
1 Rol. Abr.
506.

2 Vernon
585, 705.
1 Sid. 314.
Style 450.

con.
4 Saund. 422.

1 *Ld. Raym.*

132.

Moor 410.*Ld. Raym.*

78.

Stra. 253.

258.

shewed the reasons both of the one and the other side, about entailing copyholds; it will be now necessary to descend a little farther, and shew those particular acts of parliament copyholds are within, and those they are not within. Copyholds are within the statute of limitations; for that is an act made for the preservation of the publick quiet, and no ways tending to the prejudice of the lord or tenant. And actions concerning copyholds are as fully and plainly within the words of the act of parliament, as any other actions are, and so there is no reason to exclude them from the meaning. But debt for the fine of a copyholder is not within the statute of limitation. 2 *Keb.* 536.

Moor 596.

The 32 *H. 8. c.* 28. of the husband's discontinuing the wife's land, doth not extend to copyhold land, neither in the letter nor equity of it; for the words are, that no fine, feoffment, or any other act or acts, &c. of the wife's inheritance or freehold, which words plainly mean nothing but a common law estate, and the common law-way of conveying; and if the equity of the act should be construed to extend to copyholds, by the entry of the party, there would be a tenant without the assent or admittance of the lord.

Neither doth the other part of the act Cro. Car. 44. Inf. 44. a. 6 Co. 37. concerning leases to be made by tenants in tail, or husbands of lands in right of their wives, extend to copyholds; for it only extends to those lands that are grantable by deed; yet it was adjudged that a grant by deed of copyhold lands by a dean and chapter, should not be avoided by the successor; by the 13 *El. c. 10.* so that the question will be, Why copyholds should not be within the 32 *H. 8.* as well as the 13 *El.* and if the 32 *H. 8.* doth not extend to copyhold land; then a bishop solely cannot make a grant by copy, to bind his successor. My lord *Coke* Inf. 44. b. says, that a grant by copy in fee or in tail, for life or years; is a sufficient demising within the act of 32 *H. 8.* All those books may be thus reconciled, tho' in truth they are not contrary to one another. When a man is seised in fee of lands in right of his church or wife, or is tenant in tail in his own right, and some of his lands have been granted by copy for the space, &c. this is a sufficient demising within the act, to warrant his demising of them, so as to bind the heir or successor. But where a man is himself tenant in tail of copyhold lands, or is seised in right of his church or wife, there he can make no lease to bind by

force of the 32 *H. 8.* because they are not to be made by surrender by force of that act, but by deed indented; and tho' by licence of the lord, a lease of copyhold may be demised by deed indented; yet the estate is not originally so grantable, to which only the statute extends; and therefore, though copyhold lands have been granted, if they come into the lord's hands, this grant by copy may be a sufficient demising within the act, to warrant his letting them again by deed, according to the act; yet it seems he cannot grant them again by copy; for the act requires that leases be made by indenture: And it is observable in the dean and chapter of *Worcester's* case, though the lands were copyhold, yet when they came into their hands, they were demised by deed indented, which demise was warranted by the act, upon the former grant by copy. Now then if the 32 *H. 8.* doth not enable grants by copy, it is a great question to me, whether the 13 *El.* doth restrain them; for all leases, made according to the exception of the restraining act must pursue the qualifications of the enabling act, and consequently must be made by deed; and then if grants by copy be left as they were at common law, ecclesiastical persons may grant lands by copy in fee, with the consent

1 Inst. 45. a

sent of those persons whose consent is required to bind their successors; I mean if they have copyhold lands in fee, they may grant them by surrender to another: Not that, if they are lords, and they escheat, they may grant them in fee; for upon the escheat they free themselves in their hands, and so within the act.

Grantees of reversions of copyholds shall not take advantage of a condition broken, by the 32 H. 8. nor by the common law, (of covenants they may, 1 Keb. 350. Cro. Ca. 24, 253. *tamen quære* upon Yel. 135.) for then by entry he might come in to be tenant to the lord without admittance; and tho' he in the reversion may enter by the common law, yet he was tenant before: The act gives remedy to assignees, which he is not properly who comes in by surrender. When a copyholder enters for a condition broken, he is *in statu quo prius*, and therefore shall pay no fine; and if the grantee of the reversion might enter by force of the statute, he would be in the same place as his grantor, and so would be in as tenant, and yet pay no fine.

Copyholds are not within the 11 H. 7. c. 20. for thereby an entry being given to the next heir, he would come in to be tenant without being admitted by the lord.

The reason they seemed to go upon in the resolution was, that the lands were copyhold, and so clearly out of the statute. But another reason was mentioned by one judge, which was, that the estate being limited to the baron and feme in fee, 'twas out of the statute 11 H. 7. which only mentions estates-tail, and for lives.

Org. Car.
559, 568.

Another reason may be, because copyholds are not within the statute 27 H. 8. about jointures, and the copyhold lands are within the statutes of bankrupts; for the statute 13 Ed. expressly mentions them; and though the other statutes do not, yet they being made for further remedy in the matter aforesaid, are not to be expounded by the former; especially since that hath been taken care that no prejudice should happen to the lord. The statute 27 H. 8. c. 10. for executing uses to the possession, extends not to copyholds, which is plain from common experience; for when a copyholder surrenders to the use of another, the possession is not executed to the use; for the surrenderee hath nothing till admittance. For 'twas not the intent of the statute to execute the possession to the use of copyhold lands; for then a tenant would be introduced without the lord's consent. Neither doth the branch of that act concerning jointures extend to copyholds;

Org. Car. 44.

-holds; so that if a jointure be made to a woman in copyhold, that will be no bar to her dower. The reason is, because the words of the proviso being general and introductive of a new law, - to bar women of their dower, where they were not barred by the common law, there's no reason to extend them, since an estate in copyhold lands is very disadvantageous to the woman who must pay a fine to be admitted, which she may not be able to do, and thereby will commit a forfeiture; besides a woman is not dowable of common right of copyhold lands; and so it seems to have been out of the regard of the statute; and my lord *Coke* defines a jointure to be competent liveliness of freehold; so that it must be an estate of freehold. And in another place he says, a tenant by copy hath no freehold; but yet the statute of *Merton* that gives damages in a writ of dower, where the husband died seised, extends to copyholds; and yet seised is properly applied to freeholds. And my lord *Coke* says in his treatise of Copyholds, that a freehold is twofold in respect of the state of the land; and so any body that has an estate for life, in lands, is a freeholder; and so copyholders may be freeholders. And the other sense of the word Freehold, as

1 Inst. 36. b.
2 Inst. 325.
Cro. Car. 43.
4 Co. 39.

1 Inst. 58. b.

'tis opposed to copyhold land; but *quære* of this distinction, for it seems not to be law. For he says generally in another place, that tenant in fee, tail, and for life, are said to have a freehold, because it distinguishes it from terms for years and copyhold lands; so that he there plainly saith, that a man cannot have a freehold in copyhold lands; for if he could, where would be the distinction. Therefore I take it, tho' a feme in a writ of dower of copyhold lands shall recover damages by the force of the statute of *Merton*, yet 'tis by the equity of the statute, and not by the words.

3 Co. 9. a. The statute of *West. 2. c. 3.* in all its
2 Inst. 343. branches extends to copyholds; for 'tis an
Cro. Ca. 43. act made to redress wrong, and no ways
1 Inst. 369. b. prejudicial to the interest either of lord or tenant. The 32 H. 8. c. 9. against champerty, extends to copyholds; for the words are, *if any bargain, buy, or sell, any right or title*, so that they are within the words; and the act being made to suppress wrong, is within the equity of it, neither lord nor tenant being prejudiced by it.

Cro. Car. 43. 'Tis said by *Yelverton*, *arguendo*, that the 32 H. 8. c. 28. which gives an entry instead of the *cui in vita*, extends to copyhold lands; for the act was made to redress

redress a wrong, and it is no prejudice to the lord or tenant, that the wife shall enter; and the general words of the act that give a *cui in vita*, have been allowed to extend to copyholds. The words of the statute 32 H. 8. are, *being the inheritance or freehold of his wife*. So if this act doth in this branch extend to copyhold lands, as it seems to me it doth, then one and the same act of parliament, in one part of it, will extend by general words to copyhold, and the other not; for the first part of the act of leases to be made by tenant in tail, extends not to copyhold lands. Mo. 596. ~~441~~

The 31 & 32 H. 8. about partitions, Cro. Car. 441 extend not to copyhold, because the act provides it shall be done by writ of partition, and copyhold lands are not impleadable at common law.

* The stat. of West. 2. c. 18. which gives the *elegit*, extends not to copyhold, for if it did, the lord would have a tenant brought in upon him without his admittance or consent.

* Savil's Reports, Heydon's case, pag. 66. pl. 138. A copyhold not forfeitable by outlawry. Lit. Rep. 234. 1 Lev. 99. Hail. 127.

By the 2 Ed. 6. c. 12. it is expressly, that copyholders shall have the like traverses and remedy, where his interest is not found by the office, as freeholders and others have.

By the 1 Ed. 6. c. 14. it is expressly provided, that no copyholds should come into the king's hands by the dissolution of monasteries; which clause, it seems, was put in, that no prejudice might be to lords of manors.

The forging a court-roll is expressly within the 5 El. c. 14. A recusant convict that repairs not to his usual home, or removing from thence above five miles distance, forfeits his copyhold to the lord for the offender's life.

The 16 R. 2. c. 5. which makes it a forfeiture of lands to purchase bulls, extends not to copyholds, for the prejudice the lord should sustain if the king should have the lands. The 17 Ed. 2. c. 10. concerning the wardship of idiots lands, doth not extend to copyhold. The stat. of fines, because made to avoid controversies, and no ways prejudicial to tenant or lord. In the supplement to my Lord Coke's treatise of copyholds, it is said that the 32 H. 8. c. 28. concerning remedy for arrears of rent, extends not to copyholds. To prove which, a case is cited in *Leo.* which

4 Co. 126. b.

9 Co. 105. a.

which is this: A lord of a manor, whereof ^{2 Leo. 109.}
were divers copyholders, granted a re-
charge for life, and afterwards made a
feoffment of the manor to J. S. in fee,
who granted a copyhold for life to B.
J. S. died, and the grantee of the rent
died, and his executors distrained for the
arrears in B's copyhold lands; and it is
there said it was held by the court, that
the distress was not well taken; and the
reason is, because the words of the statute
are, *claiming only by and from him*; and
the copyholder doth not only claim by his
grantor, but by custom. This opinion,
as it seems, was upon the first hearing of
the cause; for the very case is report- ^{2 Leo. 152.}
ed quite contrary by the same reporters, ^{3 Leo. 59.}
and it is said to be resolved by all the ^{Mo. 812. con.}
judges but *Fenner*, that the copyhold ^{2 Leo. 152.}
should be charged with the rent-charge;
for the custom is no part of his title, but
only appoints how he shall hold; and
since it was charged in the lord's hands, it
is plainly within the intent and meaning
of the act, as well as the words, to be
charged in the copyholder's hands; and
to this purpose there is a case in *Dyer* ad- ^{Dyer 270. b.}
judged. But if the case were adjudged, ^{1 Leo. 4.}
that the lands should not be charged in
the copyholder's hands, on that reason,
that he doth not claim only by and from
21

&c.

Et. but by custom; yet that would never warrant so general a conclusion, that the statute in no other part should extend to copyholds; and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain. But turn the tables, and if the act of parliament doth in point extend to copyholds, as lands that are claimed by, *Et.* and that which in this case only doth make a doubt, is over-ruled, then this is a strong argument, that in other cases, where that is not which occasioned the doubt, the statute shall extend to copyholds, especially since the act was made to remedy an apparent wrong, and doth no harm either to lord or tenant.

1 Leo. 97, 8.
Owen 37.

It came to be a question, whether the 29 *El. c. 5.* of recusants, extended to copyholds, and two seemed of opinion it did, and one took this difference; when a statute is made to transfer an estate by the name of lands, tenements and hereditaments, copyhold is not within such statute.

Copyholds are not within the 31 *El. c. 7.* of cottages. 1 *Bull.* 50. 2 *Inst.* 737.

If the lord's seignior, custom or services are impeached (as it seems they must be, by a statute which transfers an estate in

in copyhold land without the lord's admission) that act extends not to them; but if the customs, &c. are not altered, then the statute doth, because that act doth not make another tenant to the lord; and it was urged by him, that by force of that statute the queen was only to have the profits, and no estate, and so the act did extend to copyholds. The statute says, the queen shall seise and take into her hands two parts of the lands, tenements and hereditaments. *Quere* of this case. It was said *arguendo* of this case, that the 13 *El. c. 4.* for making accountants lands liable to pay debts, extends not to copyholds; which is a reasonable opinion; for power is given by that act to the queen to make sale by her letters patent, which would be a very great prejudice to the lord.

I shall now shew what are discontinu-
ances of estates in copyhold lands. If
there hath been a custom in a manor, that
plaints should be prosecuted there in na-
ture of real actions, if a recovery be had
upon such complaints against tenant in tail, it
is a discontinuance; for since the custom
warrants the recovery, it is an incident
to such a recovery by the common law,
that it should be a discontinuance, which
it seems is drawn from the nature of the
thing:

4 Co. 23. a.
Cro. El. 380.
392.
Mo. 358.

thing: that a judgment given in a court of judicature, ought not to be avoided, but by matter of as high a nature, viz. by a recovery in a court of justice, and not by the entry of the party that hath right.

4 Co. 23. a.

§. A man seised of copyhold land in right of his wife, surrenders to the use of another in fee; this is no discontinuance, but the wife may enter after the death of her husband; for by the surrender he gives up no more than he had, and therefore could not give away his wife's right; though before entry she cannot be said to be tenant, because the surrenderer is by the lord's admittance made his tenant.

Cro. El. 717.
contr.

And this is not like a feoffment at common law, which being so notorious a way of conveying estates, the wife's entry was taken away, the whole estate being past away to the feoffee for the benefit of strangers, who could never have known whom to have brought their *præcipe* against, if the estate did not pass by so notorious a conveyance; and then if she still might have entered, they could never know whether she were a trespasser, or in whom the freehold was rightfully vested. But in case of copyhold lands, as there is no such inconveniency, so the nature of the conveyance will not admit of such
expo-

exposition; for a surrender is but a giving or yielding up that estate one hath from another; and 'tis in the nature of the thing impossible to surrender more than one hath. Therefore if tenant for life surrenders to the use of another in fee, 'tis no forfeiture, for it may be seen by the court-rolls who is tenant, and so the stranger is at no loss to sue; and estates at common law are guided by those rules that do not extend to copyholds, unless there be a particular custom for it. It seems when a tenant for life makes a surrender in fee, though nothing can pass by the surrender but what he hath; yet when the lord admits the surrenderee according to this surrender, then he hath a fee, for the lord hath an estate to pass a fee-simple. Another reason, besides that of passing the estate by feoffment and livery, for the benefit of strangers, why a discontinuance should be made by such passing of estates, is, because a warranty usually is annexed to such estates; and if the rightful owner might enter, the benefit of the warranty would be lost; and warranties cannot be annexed to copyhold estates. Notwithstanding this, there are cases that a surrender is a discontinuance of an estate-tail in copyhold lands, and my lord Coke says, that a surrender by custom may bar an estate-

Mo. 753.

4 Co. 23.

Ld. Raym.

1145.
Ib. 630.

1 Leo. 95;

Mo. 352, 596.

Cro. El. 717.
484.

Brownl. 121.

1 Inst. 60. b.

Mo. 358, 753.

1 Leo. 95.

1 Inst. 248. s. estate-tail: But these opinions for discontinuing by surrender do not seem to be grounded upon that reason or authority, as the contrary opinion is; for there are more cases against it than for it.

Cro. El. 148.
90.
4 Co. 25.

An infant surrenders; 'tis no discontinuance, but he may enter. A copyholder in fee surrenders to the use of another in fee upon condition; at the next court the surrender is presented as an absolute one; and the surrenderee being dead, his two daughters are admitted; the surrenderor releases to them, and then ousts them. In this case were two questions: First, Whether the presentment was void; and adjudged it was; because the warrant to ground it was not pursued, and so as no warrant at all to make such a presentment; and then without question, the presentment had been void: But if the surrender were conditional, and the presentment too, but the steward had entered it upon the roll absolutely, the roll being no estoppel nor record, the admittance is good; and the party may plead it or give it in evidence, as the truth of the case was. The next question of the case was, Whether surrenders being the only way of conveying copyhold estates, the release should transfer a right; and it was adjudged it should; for the heirs being admitted, the
lord

lord had a tenant to answer his services; and the release to that tenant operated to extinguish a right; but if a disseisin be made of a copyhold, the disseisee's release will signify nothing, because the disseisor is no tenant, and the lord hath admitted no body to answer him his fines and services.

The lord hath only a customary power 4 Co. 28, 9. to make admittances according to the surrender, and so far as he executes that power, the admittance is good; but where he goes beyond that power, he acts without a warrant, and it is void. But if the surrender be absolute, and the admittance conditional, the admittance is good, and the condition void; if the surrender be conditional, and the admittance absolute, that is void. If the surrender be to the use of J. S. and the lord admit J. N. this is void, and he may afterwards admit J. S. If he admit J. S. and a stranger, J. S. takes all, for the stranger's admittance is void. The reason of these diversities are, because when lord acts contrary to his warrant or power, his acts are void; but when he acts according to his power in one thing, but beyond it in another, for what he acts according to his power he hath a warrant, but for what he acts

O

beyond

Ld. Raym.
864.

beyond it he hath no warrant, and so it is void.

1 Inst. 52. b.

Cro. El. 373.

4 Co. 23. a.

Co. 10.

Cro. Jac. 21.

4 Co. 22, 23.

Mod. 120.

3 Lev. 308.

1 Leo. 174.

Cro. El. 148.

149. 504.

1 Roll. Abr.

505.

Str. 1042.

If copyhold lands have been usually granted in fee, grant to one in tail, for life or years, is good.

The admittance of tenant for life is an admittance of him in remainder, as to vest the estate, but not to prejudice the lord of his fine, saith my lord *Coke*; therefore upon the death of tenant for life, he shall be admitted, and pay a fine; for though his estate of tenant for life vests, yet he was never tenant to the lord for the admittance to which he pays his fine. But if a copyholder in fee surrenders to the use of one for life, and the tenant for life dies, he may enter without any new admittance, or paying any fine; for he had his old estate in him, and he was admitted tenant before; yet it was said by *Popham*, in *Guppin* and *Bunny's* case, that one fine is due in such case; but it is but of little authority; for the point of the case was, Whether the admittance of tenant for life was the admittance of him in remainder; and because it was made an objection, that if it were, the lord would lose the fine, which *Popham* answers by saying, There is none due in such case; which objection, my lord *Coke* answers by saying, That though the

the estate be vested in the remainder-man, yet a fine is due.

The case of *Dell* and *Higden*, as it is Moor 357. reported by Moor, is also contrary to the cases before; for there it is said but one fine is due; but otherwise it is of a reversion; which distinction is laid quite cross to what it is in the cases before, and seems to have been a mistake in the reporter; for as it is against the cases before, so it is against reason. The same case is reported by my lord Coke, and no such resolution is mentioned in his report of it; and it is observable, that nothing in that case, as reported by Moor, seems to have been either upon reason or authority, but one point, which is the single resolution, as the case is reported by my lord Coke. A copyholder surrenders to the use of his last will, the copyhold estate still remains in the surrenderor; for all the design of the surrender was, that he might dispose of it by will, not to vest any interest in any body, or to give away the power of disposing of it; therefore when a copyholder surrendered to the use of himself for life, then to his son for life, then to the use of his own last will, and the son died, and the father surrendered to the use of another in fee; held, that the copyholder might dispose of it in his life.

beyond it he hath no warrant, and so it is void.

1 Inst. 52. b. If copyhold lands have been usually.
Cro. El. 373. granted in fee, grant to one in tail, for
4 Co. 23. a. life or years, is good.
Co. 10.

Cro. Jac. 21. The admittance of tenant for life is an
4 Co. 22, 23. admittance of him in remainder, as to
Mod. 120. vest the estate, but not to prejudice the
3 Lev. 308. lord of his fine, saith my lord Coke;
1 Leo. 174. therefore upon the death of tenant for
Cro. El. 148, life, he shall be admitted, and pay a fine;
149, 504. for though his estate of tenant for life
1 Roll. Abr. vests, yet he was never tenant to the lord
505. for the admittance to which he pays his
Stra. 1642. fine. But if a copyholder in fee surren-
ders to the use of one for life, and the
tenant for life dies, he may enter without
any new admittance, or paying any fine;
for he had his old estate in him, and he
was admitted tenant before; yet it was
said by *Popbam*, in *Guppin* and *Bunny's*
case, that one fine is due in such case;
but it is but of little authority; for the
point of the case was, Whether the ad-
mittance of tenant for life was the ad-
mittance of him in remainder; and be-
cause it was made an objection, that if it
were, the lord would lose the fine, which
Popbam answers by saying, There is none
due in such case; which objection, my
lord Coke answers by saying, That though

the estate be vested in the remainder-man, yet a fine is due.

The case of *Dell* and *Higden*, as it is Moor 357. reported by *Moor*, is also contrary to the cases before; for there it is said but one fine is due; but otherwise it is of a reversion; which distinction is laid quite cross to what it is in the cases before, and seems to have been a mistake in the reporter; for as it is against the cases before, so it is against reason. The same case is reported by my lord *Coke*, and no such 4 Co. 23. a. resolution is mentioned in his report of it; and it is observable, that nothing in that case, as reported by *Moor*, seems to have been either upon reason or authority, but one point, which is the single resolution, as the case is reported by my lord *Coke*. A copyholder surrenders to the use of his last will, the copyhold estate still remains in the surrenderor; for all the design of the surrender was, that he might dispose of it by will, not to vest any interest in any body, or to give away the power of disposing of it; therefore when a copyholder surrendered to the use of Cro. El. 441. himself for life, then to his son for life, then to the use of his own last will, and the son died, and the father surrendered to the use of another in fee; held, that the copyholder might dispose of it in his

by him alone is good; for if the consent of dean and chapter were requisite, and had, there is no question but that grant should bind, if it were out of the statute, which it must be, to bind any body.

4 Co. 24. a.
2 Leo. 45.

If any person that hath a tortious or defeasible estate of inheritance, as disseisor, or feoffee of a disseisor, tenant at sufferance in a manor, make voluntary grants upon escheats or forfeitures, they shall not bind him that hath the right; for he is not *dominus* within the meaning of the custom, but he only that hath a lawful estate; but admittances upon surrenders or descents made by such as have defeasible estates, are good, and shall bind him that hath right; for that he was compellable so to do, and it was no more than the rightful lord must have done. In such grants made upon forfeitures, &c. the ancient services must be reserved, and the customs also. The reason of this seems to be because there is nothing but custom to warrant the grant by copy, which ought to be strictly pursued as to the estates, customs, services, and tenure, or else it is not the estate that was demised before. But yet if there be a copyholder in fee, it seems the lord may release part of the services, and not do any prejudice to the copyholder's estate; for there is an estate

estate there in being that appears to be the old estate; but when the lord grants a new estate by copy, since it is an estate against common right, and warranted only by custom, that must be strictly pursued to bind the heir. My lord Coke says, If the ancient customs and services be not reserved, the grant by copy will not bind the heir or successor. This being spoken so generally, seems to intimate plainly, that if the ancestor hath a fee in the manor, and he grants without observing the custom, his heir may avoid it, because it being a grant against common right, the custom must be pursued. (*Quare, Cro. El. 662. 1 Rol. Abr. 499.*) Besides, he puts heir in the same equipage with successor; and if he means with the consent of dean and chapter, then a bishop had as much power as an ancestor; if he means without the consent, yet it is not that should avoid the grant, but the non-reservation of the ancient tenures. And so strict is the law in this point, that if the rent be reserved in silver, where it anciently was in gold; or payable at two feasts, where anciently it was payable at one feast; or if two copyholds escheat, one usually demised for twenty shillings, and the other ten shillings, and he demises both for thirty; so if three acres

Of customary and

it seems my Lord Coke must be understood, that when any one hath an estate, to which another hath right at present, that the owner of such a defeasible estate cannot make voluntary grants. But the infant and the feoffor have no such rights; for the feoffees, in both cases, have lawful and rightful estates in the land, till they are defeated; and before they are defeated the feoffors have no right. A man seised of a manor in fee hath issue a daughter, and dies, his wife *privement enseint* with a son; she makes grants by copy, afterwards the son is born. Feoffee of a manor, on condition to infeoff another, the next day, makes voluntary grants by copy. Lord of a manor commits felony, and after exigent granted he passeth away copyhold estates, and then is attainted; if he were convicted by verdict or confession; in all these cases voluntary grants by the lord are good; for he was *dominus pro tempore*. My Lord Coke says, that if a lord acknowledge a statute, and then makes a voluntary grant, the lands are not chargeable. But Moor is against this, and there are cases where the grant of a rent-charge, in such case, shall bind the copyholder; but there is some difference between the two cases; for in case of a rent, the lands were charged with it

Moor 94.

it by the grant, but in case of the statute, the lands were only chargeable, and before the actual charge, were granted over; (*vide Moor* 811.) and therefore may be compared to the case where a man makes voluntary grants, his wife shall not be endowed of those lands, because the copyholder is in by the custom; which was long before the title of *dower* accrued to the woman. It seems the reason of this case is, because the woman had no title of *dower* to those copyhold lands while they were in the hands of copyholders; and the custom warrants the granting them again, since they have been always grantable by copy; and the estate would be destroyed, if she were dowerable of them: *Quære* of the case of the statute. But if the heir, before assignment of dower, grant lands by copy, then it seems she may avoid that; for she had then a perfect title of *dower* to those lands. Those things that take their essence by the lord's grant and interest, have no longer continuance than his interest has; therefore if the lord, tenant for life of a manor, license the copyholder to alien, and dies, the licence is gone. Lord of a manor deviseth by will, that his executors shall make voluntary grants of copyhold estates to pay debts; they

Brown. 208.

1 Leo. 16,

100.

4 Co. 24. a.

8 Co. 63. b.

1 Leo. 16.

Dyer 251. a.

Moor 236, 7.

1 Inst. 58. b.

Dyer 151. a.

4 Co. 24. a.

Owen 115.

119.

Of customary and

they have no interest, nor are they *domini pro tempore*; yet the grant is good. Tenant by sufferance can make no voluntary grants to bind the owner. Grants made after alienation in *Mortmain*, and before the entry of the lord, are good. Grants by a parson before induction, are not good. So if after institution and induction, he reads not the articles, the grant is void to bind the successor; *tamen quære*. Guardian in socage may grant copies, but not a bailiff.

My lord *Coke* says, that if there be lessee for years of a manor, and he grants lands by copy in reversion, that unless the reversion happen in possession before the lease for years expire, the grant is void. The reason seems to be, because now he makes a grant, which is only to take effect after his estate ended in point of possession, and so will bind the future lord's interest, but let his own be at large, without any grant by copy, which by construction they will not admit, but take the rule strictly, that he that is *Dominus pro tempore* of a particular estate, must grant in possession. And to this purpose is my lord of *Oxford's* case; but it is agreed on all hands, that if it come in possession during the continuance of the lord's estate, that that is good. But there

Moor 95.
Cro. El. 661.
1 Roll. Abr.
499.
Hesly 54.
Moor 147.

is

is the case of *Gay ver. Kay*, where it was held good notwithstanding it did not come in possession; and there it was said that it was custom only warranted the grant, which might as well warrant a grant in reversion as possession; and if the custom will warrant the grant of a fee-simple in possession by such particular tenant, why not a reversion in fee? And the like resolution was made in *Sir Peter Carew's* case. It seems the first ground of this law, That the lords for the time being might grant copyhold estates, was, because copyholders were only tenants at will; and so, though the lord *pro tempore* had but a particular estate, and yet granted the lands in fee, yet that was no prejudice, but rather an advantage to the lord that was to have the manor, in respect of the service he was to have done him afterwards; and if he had a mind he might put out his tenant at his own pleasure. But this uncertainty of the copyholder's estate being found inconvenient, it was afterwards adjudged, that he should retain his land, and not be subject to the pleasure of the lord; but the other part of the law was left as before; *viz.* that lords for the time being might grant lands in fee, though they themselves had but a particular estate;

estate; and this custom being continued to this day, is what warrants the grants by copy. For it is most certain, those estates that are granted by lords that have a particular interest, cannot be derived from the interests of the lords; for if they were, they must determine when the lord's estate determines; for *nemo plus juris dare*, &c. therefore where there hath been a custom that such lands have been granted time out of mind, by copy in fee by the lord, there the custom gives the estate, and the lord is but custom's instrument to convey even where he hath them in his own hands, and may, if he pleases, retain them. And to this purpose is the case of *Swain*, which seems to be a stronger case than before. Queen *Elizabeth* seized of a manor in fee, parcel of which manor was a rod and a half copyhold land, and demisable by copy for one, two, or three lives, and then the queen demised the manor to one for twenty-one years, *exceptis omnibus boscis*, &c. who assigned his interest to one *J. P.* the queen grants the reversion to *S.* and his heirs, the lessee attorns and then holds a court, and grants a house and the said rod and a half of land by copy for life, upon which some trees grew; and within the manor there is a custom that every copyholder,

holder, tenant for life, had used to take all trees growing upon his copyhold land for fuel in his copyhold house, &c. and the copyholder cut down the trees in that rod and half for that purpose, and he in the reversion brought trespass; but it was adjudged for the defendant, that notwithstanding the severance he might take estovers; for when he was in by copy, he claimed by custom, which was above the severance. Therefore if copyholders have used to have common in the lord's waste, or estovers in his wood, or any other profit appender in any other part of the manor; and the lord alien the waste or wood by feoffment or fine, and then grant an estate by copy, the copyholder may take the profits in the hands of the alienee; for the custom unites the incident to the principal, as to the copyholder who claims *paramount* the severance. If the alienation be by fine, and he doth not claim within five years, it seems he is barred. This proves that the copyholder claims by custom, not by the lord; for if he did, the feoffment would bar him of his common; the same case is reported by *Moor*. *Moor* 811.
Queen Elizabeth seized of a manor in fee, grants copyholds, parcel of the manor, to one in fee by copy, and then grants the inheritance of those copyhold lands to

Of customary and

to another in fee; the copyholder makes his will, and devises his lands to *Murtel* the plaintiff in fee, and then surrenders his copyhold land to the use of his last will, into the queen's hands; and between the heir of the said copyholder, claiming by descent, and the devisee, it came to be a question, Who should have the land? And it was resolved, that though the copyhold was severed from the manor; yet it still remained copyhold land; for it would be very unreasonable that it should be in the lord's power to destroy the copyholder's estate; and the granting the inheritance over to another, cannot vest any greater interest in the copyholder, so as to make his land free, any more than it can destroy the grant by copy: And it was further resolved, that the copyhold descended to the heir, notwithstanding the surrender; for that was void, because the lands were not parcel of the manor; and the devise only will not pass copyhold lands; and the copyholder shall pay all those services to the feoffee of the inheritance, that he used to pay, without keeping a court; for all those services that arise by reason of a court, he is excused from, because the feoffee can keep no court; therefore suit of court, and fines for alienation and admittance are gone; for

4 Co. 24. b.

Cro. Jac. 572.

4 Co. 26. b.

for now the copyhold cannot be sold, nor the feoffee cannot make admittance or grant by copy; for he is not *dominus pro tempore*, the land being severed from the manor; but all those things that were forfeitures before, are so still, if the copyholder be obliged to do them, as waste, making a feoffment. So if the land were of the nature of *Borough English*, &c. it still remains so. There is no way for such a copyholder to alien, but by decree in Chancery against him and his heirs. As this case is reported by *Croke*, it is said the copyholder's heir shall pay a fine, as before; but how can that be, when there can be no admittance: And *Coke* is against this; the case is but shortly reported by *Croke*.

Cro. El. 499.
Moor 393.

Cro. El. 252.

When the lord grants the inheritance of all the copyhold lands, the grantee of all such may hold a court, take surrenders, and make admittances, though the grantee of one copyhold cannot; and this diversity is taken by my lord *Coke*, in *Neal* and *Jackson's* case, reported also by *Croke*; and the same point is also resolved in another case of my lord *Coke's*; for though it be not a manor strictly, because there are no freeholders; yet as to the granting copyhold estates, it is a manor; for in truth every manor, consisting of

4 Co. 26. b.
Cro. El. 395.

freeholders and copyholders, hath two courts, one a *Court-Baron*, and the other a *Court for Copyholders*, whereof the steward is judge; and therefore what reason is there, since these are in effect two several courts, and there are several judges of them, that the want of freeholders should hinder the grantee from keeping a court for granting estates by copy, especially, since the consequence is so fatal? and therefore if the lord releases the service and tenure of his freeholders, yet the lord may keep a court for his customary tenants: And so though the lord cannot make two manors of one, consisting of demeans and services, yet by his own act, he may make a manor of copyholders. This seems to be but a division of the courts, which before were in one; for a manor seems to be so to two intents, as to the freeholders, and as to the copyholders; and so in effect seems to be a double manor; and therefore are there several courts in effect, and several judges, according to the matter that is before them; and so it is no new making of a manor to grant the inheritance of the copyholds, but only to put that into the hands of two men, which before was in one; and yet was as much two manors then as now. But notwithstanding all this,

1 Inst. 58. 2.

Cro. El. 39.
cont.

copyhold tenures.

211

this, there are precedents that such grantee of the inheritance of copyhold lands, cannot keep court, no more than the grantee of the inheritance of one copyhold. And it is said, that a writ of error *Cro. El. 103.* was brought upon the aforesaid judgment; and because the opinions of the justices and barons were, that the judgment was erroneous, the party compounded, and the plaintiff in error had the land, and the defendant the corn upon the ground. There is the case of *Bright and Forth*, *Cro. El. 442.* where a recovery was suffered of a manor, excepting the land in *Bradway*, in which were divers copyholders for life; which part in *Bradway* was afterwards conveyed to the countess of *Darby*, who granted a copyhold for life. In this case it was resolved, that the grant was void, because there was no manor; and though it was insisted on, by one of the counsel, that there was a difference betwixt copyholds of inheritance and copyholds for life only; for when they were for life, they could not be granted again; yet it was answered by *Anderfon*, that it was all one; and indeed what reason can there be for a difference why one should not be granted again as well as another; and why a court may be kept in one case, and not in the other? This case was *Mich. 37 & 38* *Cro. El. 395.*

Of customary and

- El.* and in *Trin.* 36 *El.* *Anderson* was of a quite contrary persuasion, and held that a lessee of the freehold of copyhold lands might hold a court and grant copies; which shews there is a material difference between the two cases; or else *Anderson* was of a very variable temper. And indeed, this case doth not seem to contradict the cases before; for there the grant was of the inheritance of all the copyhold lands; here but of part; and a man cannot, by his own act, create two several courts and manors; but when the grant is of all the copyhold lands, there is still but one court for copyholders, which there was in effect, when the manor consisted of freeholders. But be it an authority against the granting lands by copy, it seems to be but weak, being both against reason and several other cases; for after this it was held, that where a woman was endowed of the third part of a manor, and among the rest of a copyhold tenement, that she might grant it by copy; and for what appears, this was the only copyhold tenement was granted her. But this being done by act in law, no prejudice could accrue to any body.
- 4 Co. 26. b. The lessee of a copyhold for a year shall maintain an *ejectione firmæ*; for the common law warrants his term, and therefore
- 4 Co. 26. a. Cro. El. 461.

fore gives him remedy in case he be ousted:
So if the lord gives licence to make a lease,
the lessee shall have an ejectment.

There is the case of *Stephens and Eliot*,
where it was held, the lessee of a copy-
holder could not maintain ejectment at
common law; and this is generally so;
but then this must be understood of a
lease without licence, and for more than
a year; for by the licence, the lord gives
up his power of adjudging about the les-
see's estate, because when he hath given
licence, it seems he hath an estate at com-
mon law, though of copyhold lands. It
is held also, in some cases, that if a lease
be made without licence, the lessee may
maintain ejectment at common law; for
the lease is a good lease against any body
but the lord. If a copyholder may by
custom make a lease, such a lessee may by
common law have *ejectione firmæ*, making
mention in his count, of the custom, yet
this must come on the other side, by some.
In this diversity of opinion, it will be
good to see what is plain, that so we may
more easily determine and know what is
uncertain. And first, it seems plain that
a lessee for a year of copyhold land, may
have an *ejectione firmæ*: And it is very
plain also, that where a copyholder may
make a lease by custom, such lessee may

Cro. El. 483,
224.
1 Leo. 328.
Cro. El. 535,
623, 676.
Mo. 569,
539, 679, and
271, cont.
Cro. El. 469,
717, 728.
1 Leo. 100,
16.

Mo. 272.
cont.

Owen 17.
Cro. El. 535.

Cro. El. 461,
623, 676.
Mo. 539.

Cro. El. 394.
483, 524.

have ejectment. But the question is, Whether such lessee need mention the custom in his count? It seems also to be plain, that lessee by licence may maintain the action for the reason before. But the main doubt of the case is, Whether a lessee, without licence, may maintain ejectment upon that reason that the lease is good against every body but the lord. And first, there is the case of *Goodwin ver. Longburst*, where it was held, by all the judges, that such a lessee might; but the case itself was upon a lease that was licensed. And it is said, in the case of *Haddon ver. Arrosmith*, that such a lessee may have ejectment. In the case of *Col-lins ver. Harding*, it is said, that *ejectione firmæ* lies of copyhold lands; but it is not said upon what lease. In the case of *Spark*, it is said by *Popham*, that it lies in such case: In the case of *Stopper ver. Gibson*, it is adjudged, that the lessee of a copyholder shall maintain an *ejectione firmæ*; but it is not said, whether upon a lease for a year by custom, or licence; so that here is no case when this was the point of the case, and but one case where the judges were of that opinion.

On the other side there is the case of *Stephen and Eliot*, where it was held *per cur.* that a copyholder could not have eject-

ejectment; and it is said so in *Laughter's* case, and in *Harrison's* case, that ejectment lies not of it, unless the plaintiff declare on the custom; and all those cases that are for declaring upon the custom are against it. And this opinion is supported by these reasons, that when a copyholder makes a lease, he determines his will, therefore may the lord enter; and if the lessee enter, he is a disseisor. And my lord *Coke's* saying, that a lessee for a year may have ejectment, excludes others from having it.

A customary manor may be held by copy of court-roll, *ad voluntat. &c.* and such a lord may grant copies; but it seems it must of such things as have been usually demised by him; for it seems he cannot grant all his demesnes by copy, without they have been usually demised: For though they have been demised time out of mind by the superior lord by copy, that will not warrant his demise by copy; because the custom must be, that time out of mind they have been granted *per Dominum Manerii*; now they have not been granted by him that is lord of the manor, though they have by the superior lord. This case seems to prove that a customary manor to hold courts, &c. may be without any freehold services; and it may as

Mo. 679.
2 Brownl. 10,
40.
1 Inst. 57. a.

1 Bull. 57.
11 Co. 18.
Cro. Ja. 260,
cont. 327.
Yelv. 190.
cont.
These cases
are thus re-
conciled, that
a customary
court may be
held by one
that hath such
a manor, but
not a court-
baron.

Of customary and

well be objected against such a lord's holding courts, that he hath no manor, because no freehold services; but it seems he may have freehold services.

A copyholder may surrender by attorney in full court; for of common right a copyholder may surrender in court, which is common law; as he may make a lease for a year without licence; and as an incident to this power, the law allows him to do it by attorney; and a copyholder may be admitted by letter of attorney; but this is not of common right; for every copyholder is to do fealty, which the attorney cannot do for him; therefore the lord may refuse to admit by attorney; but if he do admit him, it is a good admittance. But where there is a custom for a copyholder to surrender by the hands of two customary tenants into the lord's hands, there he cannot surrender by attorney into the lord's hands, by the hands of two customary tenants; for such a surrender is warranted only by the custom; and therefore unless there be a custom also to do it by attorney, the common law cannot give that as an incident, for it allows of no such surrender.

4 Co. 26, 27. The lord himself may make admittances or grants at any place out of the manor; for he is not confined any more than

than any other person, to grant an estate at will where he pleases; but there being only custom which enables the steward to make such admittances or grants, that which he does he must do upon the manor, unless there be a custom to keep a court out of the manor, which will enable him as well as the custom to do it upon the manor. Ld. Raym.
92.
lb. 76.

It is said, that a steward may grant copies as well out of court as in; *sed quære.* Cro. El. 103.

Feme copyholder for life takes husband who doth waste, this is a forfeiture of the woman's estate; but if a stranger do it without the assent of the husband, it is no forfeiture. Ld. Raym.
159.
4 Co. 27.

If a copyholder be seised, by force of several copies, of several parcels, by several tenures, if he commit a forfeiture in one, it is no forfeiture of the rest: As if he commit waste in part of black acre, it is a forfeiture of all that acre; and by the same reason, if waste be committed in one acre, it is a forfeiture of twenty acres, if held by one tenure; for the condition in law annexed to the whole estate is broke; and so the lord may enter for the forfeiture: But where there are several tenures, though they be in the hands of one copyholder, there are several conditions in law annexed to the several parcels, and there-

therefore the breach of the one is not so of the other. If such a copyholder surrenders to the use of another, and the lord admits him by one copy *tenend' per antiqua servitia*, the several tenures remain; but if the admittance were by one tenure, then it seems a forfeiture of part would reach the whole, because the condition in law is but one. So if several copyholds escheat to the lord, and he grants them again *tenend' per antiqua servitia* to A. and he commits a forfeiture in part, this extends not to the whole.

He, that comes in by admittance upon another's surrender, is in by him that made the surrender, and shall suppose himself in the *Per* by him.

4 Co. 27, 28. Where a copyholder hath several parcels of land by several tenures, the lord ought to assess and demand his fines severally; for the fine for one may be reasonable, for another unreasonable: And if such a copyholder surrenders to the use of another, and he is admitted *tenend' per antiqua servitia*, the fines must be severally assessed.

13 Co. 2.

Stra. 447.

No fine is due either upon a descent or surrender, till admittance, for that is the cause of the fine; and therefore if after that the tenant deny to pay, it is a forfeiture; but if the fine be uncertain, the tenant

tenant is not bound to pay it presently, because he could not tell what it would be; but he must pay it in a convenient time, or else the lord may appoint a day for him to pay it on; but a fine certain he must pay presently upon admittance. *Note*; The lord ought to assess a certain time and place for payment of a fine uncertain; for the tenant cannot carry it always about him, and he ought to demand it. Hob. 135.

When the fine is uncertain, it ought to be reasonable, or else it is no forfeiture if the tenant do not pay it. As this case is reported by *Croke*, it is said, when a fine is certain, the heir ought to tender it upon his prayer to be admitted. As it is reported by *Coke*, it is said no fine is due until admittance, and that admittance is the cause; and as *Croke* reports it, so has *Moor*, 623. and if he do not pay it, it is a forfeiture. This seems to contradict what he said before; for if it cannot be a forfeiture until admittance, the demand of the fine must be of the person of the tenant to make a forfeiture. So of rent. Cro. El. 779.
Stra. 1042.
13 Co. 3.
Two years
rent upon a
surrender held
unreasonable.
Hob. 135.
4 Co. 29. b.

When a surrender is made to the use of one, without expressing what estate the *cestuy que use* shall have, he shall only have an estate for life, except there be a particular custom to the contrary; as if there be a custom that he that hath an estate

Of customary and

sibi & suis, he shall have fee; this custom is good, and so of the like. The limitation of the estate is always added to the use, not, to the surrender into the lord's hands; for a surrender of the estate gives up all the copyholder hath to the lord. Put the case then, that the surrender was made to the lord for life, to the use of another for life, what estate would the lord then have, and what could he make over? Or, *quare*, Whether the words *for life* would be of any significancy, though he that is admitted be in by the surrenderor. Yet may a man surrender to the use of his wife, for she takes the estate from the lord, as an instrument to convey the estate to her; and so it comes not within the reason of other cases, that they being but one person cannot contract; for he gives the estate to the lord, and he admits the feme to it.

Style 145.
4 Co. 29. b.

If one surrenders, and dies, if the surrender be presented according to the custom, it is good; otherwise void. So if the customary tenants, by whose hands the surrender was, die, yet if the surrender be presented upon good proof, it is sufficient.

If he, to whose use the surrender was, die before admittance, yet his heir shall be admitted; for upon admittance the
estate

estate is in the *cestuy que use* from the surrender by relation. ^{2 Sid. 38, 61.}

Where grants have been made by copy for life, a grant *durante viduitate* is good, but not *vice versa*. ^{4 Co. 25. a. 29. b. Dyer 4. Co. 30.}

A steward is a good steward to all intents and purposes, that is retained by parol either to take surrenders; or make admittances upon voluntary grants: But the lord may discharge such steward when he will, that is, if he retain him generally; yet a retainer generally by patent seems to be for life. The king's auditor or receiver hath no power by parol to retain a steward to hold the king's courts; but he ought to have letters patent of the stewardship of the manor, to make voluntary grants. The king's steward *ex officio* may make voluntary grants; much more may the steward of a common person, if he do not diminish the ancient rent.

The case of *Shaw ver. Thomson*, as it is reported by lord Coke, is an authority that debt lies not in the king's courts for damages above 40 s. but the remedy was in chancery, or in the court of the manor; as it is reported, it is adjudged, that debt doth lie in the king's courts, because the court-baron doth not hold plea of things above 40 s. As it is reported by Cro.
the

the question was, Whether the damages were well assessed to 50*l.* when the court-baron cannot hold plea of above 40*s.* and it was held they were.

4 Co. 31. Under-wood may be granted by copy, or any other thing, parcel of the manor, as a fair appendant to the manor.

Custom for one copyholder to have common, &c. in his lord's soil, is good; for all the other copyholders may have forfeited their estates or interest therein.

4 Co. 31. If copyholds come into the lord's hands, if he make a lease of them for life or years, by deed or without deed, the copyhold is destroyed; because during those

Carthew 428. estates it was not demised, or demiseable by copy. So if he make a feoffment in

3 Leo. 108. fee upon condition, and enter for the condition broken, yet it is not grantable by copy; but if he keep them in his hands never so long, or grant them at will, they may regrant them again by copy; so if the interruption be tortious, as if the lord be disseised, and the disseisor dies seised, and after the lord's estate is recontinued, the lord may grant by copy; so it seems if the disseisor had made a feoffment in fee. But if they be extended in the lord's hands, or his wife be endowed, though the interruptions be by act in law, yet they shall never be granted again.

If

If the copyholder accept a lease for 2 Co. 17. a. years from the lord, the copyhold is for ever gone; * and by the same reason a release upon that lease will pass the freehold and inheritance to him: But if a lease be made of the manor, and of a copyhold tenement by express name, yet this will not extinguish the copyhold.

Cro. Car. 521.
1 Keb. 720.
4 Co. 126. b.
Hob. 215.
181.
Cro. Ja. 573.

If the copyholder takes a lease for years of the manor, his copyhold hath no continuance, but he may grant it by copy to another: If after the copyhold comes to the lord's hands, he aliens the manor by fine, &c. the alienee may regrant it.

The lord shall not have the custody of lunatick persons lands, unless there be a custom for it; neither shall the king have it, for the prejudice that would ensue to the lord.

In case of a widow's estate, it is said to be resolved and agreed in *Lex Cust.* 156. that no fine is due. *Quære* of this; for though the estate be adjudged in the wo-

Hutton 18.
1 Rol. Abr.
592.
Nov 29.

* If copyhold lands be in the hands of a subject, who is after preferred to dignity royal, the copyhold is extinct; for it is below the majesty of a king to perform servile services. And yet after his decease, the next who hath right shall be admitted, and the tenure shall be revived in him. 2 *Siderfin* §2.

man,

Of customary and

man, yet that is no argument she shall pay no fine, for the estate is in the heir by descent, and yet he shall pay a fine, and both are compellable to be admitted; and then why should they not pay a fine? The like of dower and curtesy.

Hob. 196.

Cro. Ja. 253.

Yelv. 189.

Noy 136.

2 Rol. Abr.

61.

2 Brownl.

210.

Mo. 667.

Cro. El. 794.

2 Vernon

250.

A copyholder had common in his lord's waste; the lord grants and confirms the copyhold land to him and his heirs, *cum pertinentiis*; adjudged the common was extinct, being annexed to his customary estate, by the custom, which estate being determined, the common also is, and cannot continue without words to that intent, and *cum pertinent'* will not do; for the common was not appurtenant to the freehold estate granted by the lord; therefore care ought to be taken in enfranchising copyhold estates, to add words to continue common and other profits *apprendre* to the copyholder after the enfranchisement.

Post. Carter's

Rep. 6, 7, 22.

1 Vernon 393.

Cro. Ja. 253.

In this case is cited the case of *Ford ver. Ward*, where the lord granted to his copyholder the freehold of his copyhold, by the words of (Grant unto him all the lands, tenements and hereditaments thereunto appertaining, and thereto used and occupied); and it was held he lost his copyhold; the reason seems to be, because the common was nothing appertaining, &c.
to

to the freehold he granted: But as this case is reported by *Moor*, no other words Mo. 667. are put in all commons, &c. appertaining to the said messuage; and there another reason is added, *viz.* now he claims by the lord who cannot have common in his own ground. But this is a reason only where the common is in the lord's soil; but the other holds where it is in another's 1 Brownl. 173. soil, which is a much stronger case; for 2 And. 168. as it seems in such case there is no way to continue the common: For by the grant of the freehold it is gone, and the lord can make no new grant of it, but in his soil he may.

My lord *Coke*, in his treatise of Copy- Co. Cop. 162. holds, saith, that if the lord demand his not law. rent of the copyholder, and he saith that he wants money, and intreats the lord to Sta. 447. forbear until he be provided; that this is a forfeiture. And that if the lord make a continual demand upon the land, and the copyholder is not there, this is a forfeiture; but if he demand once, and no body is there, this is no forfeiture. Now as in other respects, so in this, *viz.* copyhold customs are not to be expounded by the strict rules in law, which appears from what *Coke* says, who owns that if the copyholder be not there upon the land, it is no forfeiture; yet in case of

Q

a con-

a condition, for re-entry, that had been a forfeiture to entitle the feoffor to an entry. But the condition annexed to copyhold estates, is a condition in law; for the estates of copyholders are but an estate at will, and yet the law makes an inheritance of it, and puts it out of the power of the lord to determine their estates, so long as they do their services. But when they fail doing this, the law no longer protects their estates, but suffers the lord to enter; but then this refusal to do their services must be wilful, as it seems, which will amount to a determination of the will of the copyholder, and not any other refusal, if he signifies his design to pay, and so to continue his will; and therefore the case above, where the copyholder intreated the lord to forbear, is not law. To prove which, there is the case of *Crisp and Fryar*, where that was held no forfeiture; but the case it self was upon a demand upon the land for three years rent, no body being there, whether it were a forfeiture or no; and as the case is reported by *Croke*, one judge was of opinion it was no forfeiture, because it was only a denial in law; and that the condition in law was not annexed to the non-payment, but to the wilful refusal: But two other judges held it to be

Moor 623.
1 Roll. Abr.
506.

Cro. El. 505.

be a forfeiture, and that a denial in law is a forfeiture, as well as a denial in deed; *sed adjournatur*; and no more of it is said in that book. But the case is also reported in *Moor*; and there it is said *Moor 359* not to be held a forfeiture by the same two judges; but the reason given was, because so long a non-payment amounted to a wilful refusal. My lord *Coke* says, that a demand upon the land is no forfeiture, if the tenant be not there, unless it be a continued demand. And there is the case in *Hobart*, *Hob. 135*, where it was adjudged, that a demand for rent or fine must be of the person of the copyholder, which proves that a denial in law will not make a forfeiture. *Moor 623*, *Cro. Jac. 617*, *con.* The case was, the lord assessed a fine of twenty nobles upon his copyholder, and appointed him to pay it to his bailiff at his house within the manor, three months after, and the fine being not paid at the time appointed, he entered without any demands. *4 Co. 27, 28*. The case of *Williams* was this; the lord demanded the rent of the copyholder; he answered, he had it not with him then, but that he would pay it as soon as he could; the lord said, pay it at my house at such a day, which house was within the manor. Adjudged, first, that

Of customary and

the copyholder's words (though a denial in law) was no forfeiture, but his non-payment at the day assigned was a forfeiture, because it amounted to a wilful denial, for he promised to pay it, and failed; but had the place assigned been out of the manor, it had been no forfeiture. This case is apparently different from that next preceding; for here was a demand of the copyholder himself; there was no demand at all. There is the case of *Caston* and *Utbert*, where a widow had copyhold lands, and divers persons came for the rent, whom she put off with delays; at last comes a young gentleman and demands it; she answered that she did not know him, but if he would dance before her, if she liked his dancing, she would pay him; this denial was adjudged no forfeiture, not being wilful.

Lit. Rep.
268.

8 Co. 92.

If the estate of the lord cease by limitation of use, and the use and estate of the manor is transferred to another, who demands the rent, and the copyholder denies to pay it; no forfeiture without notice to him of the change of the use and estate. The like law of a bargain and sale of a manor inrolled, &c.

It seems the law is the same concerning lease and release; but if the manor be in possession of the lord himself, and not in
the

the hands of any lessee, and he makes a lease, and then releases, the lessee having possession; *quære*, if the copyholder denies paying, if this is not a forfeiture, because the entry of the lessee is notice as much as livery, &c.

Non-appearance at court after summons is a forfeiture of the copyhold; but without warning it is no forfeiture, but only negligence; and after summons it is a forfeiture, without an express refusal, as in case of rent: For the consequence is more fatal in this case, because without the copyholder's attendance there can be no court.

Moor 350.
3 Bult. 80.
1 Rol. Rep.
256, 429.
Noy 5.
Cro. El. 505.

It is held *per tot. cur.* in Sir J. Braunché's case, that a general warning within the parish is sufficient; so that if the copyholder doth not come, let him live where he will, it is a forfeiture, because his tenant may send him word: It was there likewise held, that sickness, or a great office, may excuse the copyholder's attendance, and that services could not be done by attorney, but an attorney may essoin. But as to the point of general warning, four days notice has been adjudged sufficient time; and how can a copyholder be summoned in that time that lives 200 miles off; therefore it was held in the

Lee. 104.

Cro. El. 353. case of *Taverner ver. Cromwel*, that general notice is not sufficient, but a personal summons: The like in *Crisp and Fryar's* case. This opinion seems most reasonable. If a copyholder be in debt, and is afraid of being arrested, or is a bankrupt, and keeps house, these are good excuses. Co. Cop. 159. *Vide 3 Leo. 107.*

Latch 122.

Style 141.

The lord comes to the copyholder, and requires him to do his services, and the copyholder answers, if they are due, he will do them, but it shall be tried at law first, whether they are due by law; this is no forfeiture, being no wilful refusal. If the copyholder say, if it be a court, he will appear at it, if not he will not, this is no forfeiture; but if there were no controversies about the court, but that is only used as a shift, then it seems it is a forfeiture.

Style 387.

8 Co. 100.

Cro. Jac. 101.

1 Leo. 100.

4 Leo. 30.

31.

If a copyholder refuse to be admitted, it is a forfeiture. If a copyholder come not to be admitted where the custom of the manor is that every heir shall come to court to be admitted; and if he do not, proclamations shall be made for him to come in; and to in the two next courts, or else that the lord shall seise; this is a forfeiture, for the custom is a good custom, being only to compel the tenant to come in and be admitted. But if the heir

heir be beyond sea at the time of the descent, or within age, *non compos*, or in prison. But it seems such custom would bind a feme covert, being like to the case of fines at common law; in which case they only were not bound who could not make claim; but a feme covert having a husband, may claim by him, and therefore she was bound. But if such heir be within *England*, at the time of the first proclamation passed, and then go beyond sea, he shall forfeit; for he had warning, and ought to have come in, and not have disabled himself from making claim. But if he had gone beyond sea, after the descent, and before the first proclamation, this had been no forfeiture; for at the time of the court he is to make claim; *sed quære*. It was said by *Williams*, that because the lord cannot have any services done him in the mean time, that the lord may seize the lands and take the mean profits, and shall not be answerable for them. *Sed quære*.

If a jury or homage refuse to present the articles, according to their oath, this is a forfeiture of their copyholds, for the prejudice thereby ensuing. If the copyholder make a lease, it is a forfeiture, yet it is no disseisin to the lord, which is plain from the cases that say such a lease

is good against every body but the lord; for it could not be a lease at all, if it were a disseisin. It is a forfeiture, because the copyholder has broke the custom of the manor, by bringing in a tenant without any admittance; but it is no disseisin in favour of the lord, since the copyholder hath such estate as may last much longer than the lease, and not a bare lease at will.

1 Bulst. 189.

Jones 249.

1 Rol. Abr.

510.

1 Bulst. 215.

A lease that will make a copyholder forfeit his estate, ought to have a certain beginning and end, or else it is a void lease, and can convey at most but an estate at will, which is no forfeiture. A copyholder for life makes a lease for a year, and then makes a lease to the same party for another year, to commence one day after the first year, and then surrenders his copyhold to the lord; it was adjudged the second lease was a forfeiture; for it is not warranted by custom, and so being out of the custom, it is, as every other lease for years, a forfeiture; for though it be not to commence till after the first lease ended, yet the land is charged with a double interest, one *in presenti*, the other *in futuro*; which is against the custom, and so a forfeiture. Secondly, It was adjudged this lease was void against the lord, who had the land by

copyhold tenures.

233

by the surrender, and when the lord enters by force of the surrender, he is in by title *paramount* the lease. But it seems the first lessee shall enjoy his lease, or else it were in the power of the lord to defeat his own grant. There is nothing said of this; but the case in *Rolls* is, That the leases were executed at one and the same time; and then the lessee, being *particeps criminis*, may perhaps forfeit; and as the case is reported by the rest, the lease was made to him to commence in reversion; and so he is as much party to the wrong as in the other way; and so it seems the lord may enter presently. The same point of a lease for a year except a day, adjudged a forfeiture. 1 Rol. Abr. 519.
1 Rol. Abr. 508.
Cro. Jac. 308.

A. makes a lease of his copyhold to one for a year, and then covenants the lessee shall enjoy it *de anno in annum*. No forfeiture, only a covenant and not a lease. *Quere*, and see the book; for the words *Covenant and Grant* make a lease, &c. But in another case it was held that these words by construction might make a lease, where the lands might be let; but otherwise where the lands could not be let; which distinction seems very reasonable; for the words themselves do not import a lease; and it would be a very injurious construction to make them a lease,

2 Keb. 267. lease, and so a forfeiture, when they only import of themselves a covenant.

Cro. El. 499, 351. A lease for years by parol, to commence *in futuro*, is a forfeiture, because of the unlawful contract made to the lord's disinherison.

Moor 392. Moor 184. The lord gives licence to his copyholder to make a lease for twenty-one years, to begin next *Michaelmas*; the copyholder makes a lease accordingly; but before *Michaelmas* makes another lease by indenture to another for twenty-one years to begin at *Michaelmas* next; it was held by *Anderson* that this was a forfeiture; *sed quære*; for the lease was void in point of interest, and only worked by way of estoppel betwixt the parties; and if no interest passed, how could it be a forfeiture? Yet had the first lease been surrendered, the second lease would have taken effect, and then the land had been charged with a lease without licence; but till that happened, the land was charged with nothing in point of interest. And this not like the case of a future lease; for there the land is bound presently; and though this may happen to be a charge, yet the supposition is foreign, and ought not to be intended to work a forfeiture. If a man make a deed of feoffment of his copyhold, or a demise for life with-
out

out livery, no forfeiture, because without livery nothing passes; but by a lease for years an interest passes by the delivery of the deed, and therefore that is a forfeiture. *Inf. 39. a.*

-My lord *Coke* says, if tenant for life of a copyhold suffer a recovery by plaint in the lord's court, as a copyholder of inheritance, this is a forfeiture, but *Lex. Cist. page 206.* says it was otherwise adjudged in the case of *Bird and Kerk.*

Idco quare. If a copyholder erect a new house upon the land without licence, it is no forfeiture, because it is for the melioration of the state of the land; but then it seems this house must be subject to all the customs of copyhold land; therefore if he pull it down again, it is a forfeiture. *Roll. Abr. 507.*

Waste, either voluntary or permissive, is a forfeiture of copyhold lands, unless there be a custom to cut trees, &c. It seems if a stranger doth waste in the copyhold lands, it is no forfeiture, because not the copyholder's act. *Bulf. 50. 8 Inf. 63. a. Roll. Abr. 508. Mo. 49. cont. Co. Cop. 163.*

My lord *Coke*, in numbring permissive waste, doth not reckon the waste done by a stranger. And further it is resolved in *Clifton's case*, that if the husband commit waste in lands of his wife's, it is a forfeiture; but if a stranger commit waste, it is no forfeiture; and it seems every forfeiture ought

101 . 00 00000 00 in 000 000 0000

Lit. Rep.
267, 268.

Cro. El. 5.
13 Co. 68.
cont.

Cro. El. 498.
1 Roll. Abr.
508

to be the wilful act of the copyholder, so as it may amount to a determination of his will. Turning plowed land to hop ground or a piscary is a forfeiture. It is said to be resolved in my lord *Montague's* case, that a copyholder by common law, cannot take house-bote, &c. but must have a special custom to warrant it. There is the case of *East* and *Harding*, as reported by *Croke*, that a copyholder cut down timber-trees, and let them lie five years, and after the action brought employed one of them; but the jury found he cut down the trees for the reparation of his house; and even in this case two judges were of opinion that it was no forfeiture, being cut down to repair; and yet in the putting this case, there is no custom said to be found for the cutting down timber for reparation. But *Moor*, in arguing says, that it was found so. Here the trees were not employed in five years, and then but one employed, and that too after the action brought. *Moor*, in reporting this case in the former part says, the copyholder cut down two trees, no custom being found one way or other, for the cutting to be a forfeiture or punishable. And then a little further he saith, that the jury found the custom for cutting trees for
repa-

Moor 392.

reparation; and then afterwards he says, that it was resolved, Doing of reparations as it is found, though it be five years after the cutting, and after entry for the forfeiture, and action brought, is a dispensation for the forfeiture. The opinion of *Popham* was, that a copyholder may cut timber for reparation, without custom. It was adjudged between *Dawbridge* and *Cocks*, that a copyholder may lop off the under boughs without a special custom, but not the top boughs, because that would cause a putrefaction in the timber. It seems reasonable that a copyholder should have timber to repair, &c. *sed quare*. In *Swain's* case a custom was found to take house-bote, fire-bote, &c. Custom that every copyhold tenant may cut down trees at their will and pleasure is unreasonable and void; for then a tenant at will might do it. So it is for a copyholder for life to do it; and one of the reasons given is, that the succeeding copyholder would not have wherewithal to maintain the house and the plough, which plainly intimates that a copyholder may cut timber to make reparations; and the rather, because permissive waste is a forfeiture in him. If there is a copyholder for life, who by custom may name his successor for life, and so for

Cro. El. 292.
1 Roll. 508.
Cro. El. 361.

8 Co. 64.
Winch 1.
Cro. Ja. 30.
Cro. Car.
220.
1 Bull. 50.
Noy 2.
1 Roll. Abr.
650, 660.

Of customary and

for that copyholder to name his successor, such a tenant for life cannot by custom cut timber. But if he had been a copyholder of inheritance, such custom is good. And my lord Coke says, that if a copyholder do waste, it is a forfeiture, unless there be a custom to the contrary. If there be a custom for a copyholder to take timber for reparations, fuel, &c. such a custom is good, though the copyholder have but a particular estate, though he cannot do what he will with the timber.

If the copyholder take the shrouds of trees by custom, if the lord takes the body, an action of the case lies against him, which seems to prove, that the lord may not cut down the trees upon the copyhold lands, which is very reasonable; for the copyholder hath a particular interest in them; and then if a copyholder of inheritance cannot cut them down by custom, the timber may stand and rot, and no body the better for it.

Where a copyholder may take trees for reparation, the cops and tops belong to him, and though he cannot repair with them, he may sell them to help to defray the charges. Copyholder for life cuts down trees, the lord may take them. So it seems, if he be a copyholder of inheritance,

copyhold tenures.

239

ritance, if there be no custom. Under-
lessee cuts down trees, it is no forfeiture
of the copyholder's estate.

If the lord grants his trees growing
upon the land, or which after will grow,
he may cut the trees, now growing, by
force of the grant; but as to those that
are not grown, the grant is void.

Two years value, for a fine for an ad-
mittance upon a surrender, was adjudged
to be unreasonable, but where copyholds
are only for life, and fall into the lord's
hands, there the interest passes from the
lord, and so *arbitrio domini res aestimari*
debet; but in case of surrenders, the lord
is only an instrument.

The lord of the manor may cut down
the timber-trees growing upon the copy-
hold lands, provided he leave sufficient
for house-bote, &c. This must be under-
stood where there is no custom for the
copyholder to cut timber-trees. There-
fore the case before must be understood,
when the lord cuts down the trees, there
not being sufficient left for fuel; for tho'
a custom be alledged for taking thronds
for fuel, it is no more than the common
law allows; and therefore if the lord cut
down the trees without leaving sufficient
for fuel for the copyholder to take thronds
of, an action upon the case lies against the
lord.

13 Co. 69. lord. And my lord *Coke*, presently after he had laid it down as a resolution, that the lord may take the timber-trees, leaving sufficient for the copyholder for house-bote, &c. puts a case of an action upon the case brought by a copyholder against his lord, for cutting down pollingers, where, by the custom of the manor, every copyholder had the loppings of those trees for fuel. And this case is cited to prove that an action of trespass lies against the lord for cutting trees, not leaving sufficient, so that the case must be understood, where there was not sufficient besides; or else my lord *Coke* cites a case where it is resolved that the lord can cut down none, to prove that an action of trespass lies for cutting, and not leaving sufficient; which follows another resolution in the same case, that the lord may cut down timber-trees, leaving sufficient; and the custom to cut makes no alteration; for it is resolved in the same case, that every copyholder *de com. jure* may take trees for house-bote; so that the laying the custom seems to be only by way of caution.

Strange 447.
Ld. Raymond
1900.

* It seems if a copyholder commit felony or treason, he forfeits to the lord,

* *Revertitur terra ad dominum capitalem, vel ad rectum dominum, scilicet ad ipsam de cujus feodo est.*
Bracton, l. 3. fol. 130.

without

without any particular custom; else a felon would have no punishment in his posterity, if he had copyholds of never so great value. *Coke*, in one place says, if a copyholder commits felony or treason, he forfeits his copyhold presently; in another place he says, he forfeits upon presentment; * and in a third place he says the lands escheat to the lord. In none of these cases he mentions any custom, but speaks generally. It is a forfeiture presently before indictment or attainder, as it seems, because the custom will not, in favour of a felon, support an estate at will, but let the lord determine it, as in case of any other estate at will. The law will not give his estate to the king, because then the lord would lose his services; † yet in *Packinton's* case, a custom is alledged for the lord to have the forfeiture of his tenant's copyhold land for felony; and there the custom was for the

Ld. Raym.
1000.

Co. Cop. 150,
164.
13 Co. 3.

1 Leo. 1.

* As to forfeitures of copyhold estates for treason or felony, vide *T. Jones's Rep.* 189. 2 *Vent.* 38, 3 *Levinz* 93. 2 *Vent.* 38. 1 *Lev.* 263. 1 *Lev.* 34. 1 *Bulst.* 13. 2 *Brown.* 217. *Godh.* 287. *Cr. Eliz.* 499.

† In *Packinton's* case it was adjudged, that the lord might seise; because the custom was found for him to seise. 1 *Leo.* 1.

R

wife

Of customary and

wife to have her free bench, and be admitted, during which time he that had the inheritance was attainted and died, and then the wife died; it was adjudged the inheritance was forfeited to the lord, notwithstanding he was not tenant: The custom was if any copyholder be convicted of felony. However, it seems conviction is not necessary; but if the thing will bear it, it is good to lay a custom.

Co. Cop. 164.

Ut supra.
Ld. Raym.
154, 306,
307, 1000.

2 Keb. 451,
456.

* My lord *Coke* says, that if a copyholder be outlawed or excommunicated, upon presentment, the lord shall have the profits of the lands. It is said in *Lex Cust.* 210. that if a copyholder be outlawed in a personal action, it is no forfeiture of his copyhold, but the king shall have the profits; *quare* of this; for then how can the lord have his services paid him? *Quære*, If a copyholder forfeits any thing in utlawry, unless for a capital crime. If a man be convicted of manslaughter, and reads, he shall not forfeit. Inclosure of copyhold lands is no forfeiture. If the lord hath used to have a

* If tenant at will be outlawed, his estate is determined; but a copyhold is not forfeited or determined by outlawry. *Lit. Rep.* 234.

A copyholder was outlawed, adjudged it is no forfeiture of his estate. 1 *Leam. 99*: *Hith* 127.

field-course over the lands of the copyholder, if he inclose them, and there hath been a custom to fine for such inclosure; it is no forfeiture; but if there hath been no custom to fine, it seems it is a forfeiture, because the lord hath no other remedy. Rescous and replevin are forfeitures of copyhold land, because they amount to wilful refusals. Defacing of land-marks is a forfeiture.

Feme copyholder of inheritance takes husband, who makes a lease for years by deed indented, and dies; the feme may enter; or if she be dead, her heir may enter; because the forfeiture for which the lord might enter, continues no longer than the husband's life, and then she may avoid the lease; but if she does any thing that makes the lease to have continuance, it seems then the forfeiture remains; but if the husband doth waste, as in cutting trees, there the lord's inheritance being prejudiced, the forfeiture always remains. Id. Raym. 1600. So if the husband denies to pay the rent, or to do suit; for the lord must have his services, and the feme hath no way to avoid those nonfeasances. 4 Co. 27. a. Cro. El. 149. 2 Rol. Abr. 509. It was said by one judge, that if the lands come to the feme after marriage, it is no forfeiture, because it cannot be said to be her fault to take such a husband as would not do the

services. But it seems this distinction, for the reason aforesaid, is of no use, and it is not mentioned in any book. Most of the judges of *England* were of opinion, that a lessee for years might take advantage presently of a forfeiture, though his lease were to commence in possession at a day to come. It is agreed on all hands, that lessee for years of a manor may take advantage of the forfeiture.

Cro. El. 499.
Mo. 393.
1 Rol. Abr.
509.

Owen 63. A copyholder makes a lease for years, the lord grants the freehold in fee or for years, no body can take advantage of the forfeiture; for the wrong was to the lord *pro tempore*, and he hath dispensed with it by making a grant.

Roll. Abr.
858.

Ld. Raym.
1000.

9 Co. 107. a.
2 Leo. 73.

Copyholder for life, the lord makes a lease to commence after the end, forfeiture, or determination of the estate for life; the copyholder commits a forfeiture; the lord will not enter; the lessee may. Copyholder for life, remainder to another in fee, the first copyholder commits a forfeit, he in the remainder shall not enter, but the lord shall hold it during the life of the first copyholder; for copyhold estates are not like those at common law; for in copyhold cases the remainder is to commence after the death of tenant for life, and not after his estate or interest is gone. But in such case the forfeiture
of

of tenant for life would not prejudice the estate of him in remainder, unless there be an express custom for it. So if there be a custom, that if upon a surrender made, the *cestuy que use* doth not come to be admitted before three proclamations pass, that he shall forfeit his estate. If in that manner a surrender be made to the use of *A.* for life, the remainder to *B.* in fee; and *A.* suffers three proclamations to pass, and *B.* makes no claim; yet shall not *B.* forfeit his remainder, for the custom shall be taken strictly; but the reason of the resolution of the case implies, that had the custom been laid to reach remainders too, it had been good, and the remainder had been forfeited in that case.

Then there is the case of *Rastal* and *Turner*, where tenant for life of a copyhold, the reversion to another in fee, contrives to sell the copyhold to another in fee, which is to be done in this manner: The tenant for life is to commit a forfeiture, and the lord is to seise, and grant it in fee by copy to the vendee; all which is accordingly done; it was adjudged, that the interest of the reversioner was no ways prejudiced by the forfeiture. These authorities are grounded upon the highest reasons; for else he that hath but a particular interest in copyholds,

Cro. El. 879.
Ld. Raym. 1000.

will have as good an interest as those that have a fee; for by secret covin he may commit a forfeiture, and so give away the fee. But notwithstanding these authorities grounded upon so good reasons, there is a case in *Moor*, where a copyhold to two for lives to have *successive*, and the first committed a forfeiture, and it was adjudged that thereby the remainder was forfeited.

Mo. 49.

Co. Cop. 164.
Cro. El. 499.
Litch 227.
3 Keb. 641.

It is held by my lord *Coke*, that a presentment is necessary to make a forfeiture in those cases, where the lord cannot be presumed to have notice of himself, as if the tenant commit felony. But it is said *per Cur. alibi*, that presentment is not of necessity, but only for the lord's better instruction, and he may take notice himself if he will. And indeed the reason given by *Coke* is of no cogency, that because the lord cannot by intendment have notice of them himself, that therefore he shall take no advantage of them without presentment; for if he can take notice of them, why should he not, since presentment is not that which gives title, but only lets him know what he hath a title to: But however, it is safe to get such things presented; and if there be a custom for it, it must be pursued. Where the tenure is several, there the forfeiture of

4 Co. 27.
Cro. El. 353.

of one part is not a forfeiture of all. It is said by my lord *Coke*, that if the tenure be one, that a feoffment of part is a forfeiture of the whole: But it is said in *Lex Custom.* that only so much is forfeited; but if waste be committed in part, that the whole by the same tenure is forfeit; for that goes to the destruction of the houses, and so of the whole copyhold estates. But if there be no building, *quere*; for it seems unreasonable then, that waste in part should be a forfeiture of the whole; and so it seems in case of feoffment of part.

Copyholder by licence lets for years, the lessee makes a feoffment, he only forfeits his lease. It is said to be resolved in Chancery, that if the father commits a forfeiture, and dies, and the lord admits his heir, that this is no dispensation with the forfeiture, because the ancestor died seised of no estate, and so none could descend to the heir. This case seems to be unreasonable, for it seems that the ancestor died seised of an estate; for nothing removes the legal estate and interest out of him but the lord's seizure.

There is a distinction taken in *Keble*, that where after the death of the tenant, the lord accepts a heriot-service, that is a dispensation with the forfeiture, but not

Vide Cro. Ca.
234. and
1 Keb. 15.

where he accepts heriot-custom: This proves, that after the forfeiture the estate is in the tenant, else the lord could not have heriot. The reason for the difference seems to be, because in accepting of heriot-serve, he admits the heir tenant; but in accepting heriot-custom, he only admits the tenant died seised, *Sed quare*; for it seems to me to be a dispensation; for he admits him to be tenant after the forfeiture committed; and therefore if the lord accept of any services after he knows of the forfeiture, it is a dispensation; for why should not the acceptance and acknowledgment of the tenant to be tenant after a forfeiture, as well dispense with a forfeiture, as acknowledgment of the heir to be a tenant? But it was resolved in that case, that if the lord hath once entered for the forfeiture, no acceptance afterward shall conclude him.

1 Leo. 104.

If the tenant appear not at court after personal warning, and the lord amerce him, this is a dispensation with the forfeiture. If a copyholder come to his estate tortiously (it seems it must be by admittance, else the release will not operate at all) and commits a forfeiture, and then he that hath right releases to him, this shall hinder the lord's entry, because now
he

he hath, as it were, another estate, of ¹ Brow. which he hath committed no forfeiture. ¹⁴⁹.

Sed quære.

If the tenant repairs before the lord ^{Moor 593.} enters for forfeiture, this purges the for- ^{Latch 227.}feiture. Cutting trees to repair, and employing them five years after, purged the forfeiture.

The succeeding lord shall not take ad- ^{2 Sid. 8.}vantage of waste done in the time of the preceding lord: But yet it was adjudged, ^{Ld. Raymond} that if there be lord, and two coparceners ^{1000.} copyholders, and one makes a feoffment in fee of her part, and then the lord ^{Pal. 446.} makes a lease of the manor, that though ^{Lat. 227.} the lessee can take no advantage of the forfeiture, that yet the heir of the lessor may. The reason of the diversity seems to be, because waste is a prejudice to the lord only, for the time being; at least; and is not so great a prejudice as feoffments, (and so it seems of other forfeitures, as denial of rent, suit of court, &c. and *a fortiori* for these forfeitures, for the denial doth no way prejudice the succeeding lord) but feoffment devests the lord of his freehold and inheritance; which being standing prejudices to the lord, he ought to have remedies as lasting as the harm that is done him. *Quære*, If the lessor

lessor outlives the lease, whether he may take advantage of the forfeiture?

5 Co. 116.

Moor 72 a.

1 Roll's Abr.

727.

9 Co. 106.

9 Co. 107 a.

4 Co. 26, 27.

1 Leo. 288.

cont.

Upon entry for the forfeitures the lord shall have the emblements; so if it were leased, copyholder for life, remainder to another for life, the tenant for life accepts of a bargain and sale of the freehold and inheritance of his lands, to him and his heirs, and then of a fine: This does not displace the remainder, but he has power to take at any time after the death of tenant for life. If the lord grant a rent-charge out of the inheritance of copyhold land, and then grants the freehold and inheritance to the copyholder for life, he shall hold the land discharged during his life; so if there be a remainder over, it shall not commence during the estate for life. A lord may make a grant or admittance of a copyhold out of the manor, at what place he pleases; but the steward cannot, at a court held off the manor, make any grants or admittances; and in *Coke's 1 Inst.* 58. a. he says, that a court-baron cannot be held off the manor, unless the lord hath two or three manors, and hath usually kept court at one for all; which plainly shews, that a lord cannot make admittances or grants at a court held off the manor, no more than the steward. For *Coke* says, that if the court-

ritance, if there be no custom. Under-
lessee cuts down trees, it is no forfeiture
of the copyholder's estate.

If the lord grants his trees growing
upon the land, or which after will grow,
he may cut the trees, now growing, by
force of the grant; but as to those that
are not grown, the grant is void.

Two years value, for a fine for an ad-
mittance upon a surrender, was adjudged
to be unreasonable, but where copyholds
are only for life, and fall into the lord's
hands, there the interest passes from the
lord, and so *arbitrio domini res estimari
debet*; but in case of surrenders, the lord
is only an instrument.

The lord of the manor may cut down
the timber-trees growing upon the copy-
hold lands, provided he leave sufficient
for house-bote, &c. This must be under-
stood where there is no custom for the
copyholder to cut timber-trees. There-
fore the case before must be understood,
when the lord cuts down the trees, there
not being sufficient left for fuel; for tho'
a custom be alledged for taking shrouds
for fuel, it is no more than the common
law allows; and therefore if the lord cut
down the trees without leaving sufficient
for fuel for the copyholder to take shrouds
of, an action upon the case lies against the
lord.

Of customary and

communi jure, and therefore may be by attorney. But if the surrender be by the hands of two customary tenants, there it cannot be done by attorney without a special custom. Admittance by the lord in court, and out of court, seems to be *de communi jure*, and therefore it seems may be done by attorney. It is said to be resolved, that a copyholder cannot surrender by attorney without deed, *Pract. Reg.* 136. but that he may be admitted by attorney without deed. *Quære* of this.

1 *Leo.* 36. If the copyholder be in prison, and that he cannot come, the lord may appoint a special attorney to go to him and take his surrender.

3 *Bulf.* 80.
Hutton 81.

Any words spoke by a copyholder in court, shewing his intention to surrender into the lord's hands, amounts to a good surrender; as if he come in court and say, that he is weary of his copyhold, and desires his lord to take it, this is a surrender; but to say he renounces his copyhold, this is no surrender, because he limits it to no body. So if he say he is content to surrender, it is no surrender; for that only expresses his inclination to do it, not that he actually doth it. *Quære*, Whether words spoke out of court will amount to a surrender.

1 *Rel. Abr.*
302, 3.

Sir

Sir *H. P.* lord of a manor, whereof : *Leo. 191.*
C. was a copyholder in fee, and the lord pretended that his copyholder had forfeited, and thereupon entered into communication with him about it; and it was agreed between them, that *C.* should pay 5*l.* to the lord, and should enjoy the said customary land (except a wood) for his life; and that *C.* should have election, whether he would have those lands assured to him by copy, or by bill; and he chose by bill, which was accordingly done; adjudged this was a good surrender for life only, and that the lord had the wood discharged of the customary interest. Now the communication in this case seems to have been that which caused the surrender, for nothing else could; and for ought appears, this communication was out of court. The acceptance by bill could not be the surrender in this case, for the bill was never made of that; so that it could only be the communication that amounted to a surrender.

Copyholder in fee comes into court, 3 *Bull. 80.*
and there accepts a copy to himself for life, remainder to his wife for life, remainder to his son for life; this is tantamount to a surrender to the use of himself, &c. but he hath his old reversion in him; for there is no ground to make a
surrender

surrender of that by construction, because he has made no disposition of it. **1 Rol. Abr. 501.** But as this case is in *Rolls*, it is said, that it was no surrender; for that a copyhold cannot be surrendered by a surrender in law, but only by actual surrender; yet as it is in other places in *Rolls*, it is as in *Bulstrode*, held to be a surrender, but that the reversion was still in the copyholder.

A. covenants with *B.* to assure him all his copyhold lands, and after he surrenders divers parcels by name, and some by buttals and boundings; at the next court the surrender is presented and inrolled, but with this addition, by the name of **Dyer 251. b.** all his copyhold lands; there no more shall pass than what was named in the surrender.

Kitch. 81. b. If a surrender be made to the lord expressing no use, it shall be to the use of the lord; for it cannot be imagined that the surrender was made to no end or purpose; and a surrender may be made to the lord, and no use need be expressed. If a surrender be made to the use of another, without expressing what estate he shall have; a custom that the lord may grant it in fee to him to whose use the **Cro. El. 39a.** surrender is made, is a good custom, for he is a chancellor in his own court; and so

so when the thing is left uncertain, it is no way unreasonable for the lord to determine what shall pass. If a man bargains and sells copyholds lands, it seems nothing passes but a use; for copyholds are out of the statute of uses, and therefore such a bargainor may afterwards surrender it to the use of the bargainee; and no estate passing, it seems to me to be no forfeiture.

Copyholder in fee surrenders to the lord without declaring the use; at the next court, it was regranted to him and his wife in tail, remainder to his right heirs. Now this subsequent admittance explains to what use the surrender was made.

*Poph. 125.
126.
Cro. Ja. 434*

A copyholder in fee surrenders to one for life, the lord admits him in fee, yet the surrenderor has a reversion in him; for the lord is but an instrument, and cannot devert the estate of him that surrenders. But if there be a copyholder for life, and he surrenders to the use of another for life, who is accordingly admitted, and then dies, yet the surrenderor shall not be admitted again; for by the surrender he passed away all his estate, and had no interest left in him. If the surrenderor had died, it seems that the estate of tenant for life was not ended, for

Cro. Car. 205.

for then the lord would have two deaths to depend upon, either of which would bring him to the estate, and yet but one person that had an interest.

Mo. 8. n. 7.

Custom that lessee for life may let for another's life, is void. It seems if there be a visible inconvenience, that one copyholder for life should change the lives by surrendering into the lord's hands to the use of another for life, that the lord will not be compelled to make admittances thereupon.

1 Rol. Abr.
503.

Dyer 264. a.

Feme tenant for life of a copyhold, took husband, and the reversion of the same was granted to three for lives, and then the baron surrendered to the use of the first reversioner for term of his life, and so he was admitted tenant, and died; and then the second died; and the third prayed to be admitted; and his copy was *cum acciderit post mort. sursumred. vel forisfac.* of the woman; and it was the opinion of the justices, that he ought not to be admitted; but the lord may retain it in his hands as an occupant. The reason is, because the interest of the feme was concerned, who had not surrendered: But there was this further in the case, that baron and feme would have released their right to the reversioner, but the lord would not hold a court for it:

But

But it was decreed in chancery that he should either hold a court or quit the possession. It is resolved in my lord *Coke's* reports, that when a copyholder surrenders to the use of another, and the lord admits him, that he is in by the *Per* by him that makes the surrender. This being spoke so generally, cannot by any fair construction but extend to all surrenders, either by tenant for life or in fee. But in the case of *King* and *Lord* it is adjudged, that if a copyholder for life surrender to the use of another for life, who is accordingly admitted, that he is in from the lord, and not from the surrenderor. *Popham* 39. *Quare* well of this matter; for the tenant for life hath not such an estate as to be allowed to grant for life to another; but when a copyholder in fee surrenders to the use of another for life, he is in *quasi* by the copyholder. This is against my lord *Coke*; and as it seems against reason, for the lord is but an instrument to convey; therefore he is compellable to grant according to the surrender; and no charge by him while it is in his hands, shall be of any force; and he that surrendered shall pay the services; and the words of *Coke* are general, that he shall be in by the copyholder, in ad-

S

mittances

Co. Cop. 108, mittances upon surrender: Yet *Coke* says
109.

in another place, that by surrender to the lord out of court, the estate passeth to the lord under a secret condition, that it

1 Inst. 62. a. be presented at next court. But it hath

1 Leo. 101. been adjudged since, that by surrender to

Cro. Ja. 403. the lord by the hands of two tenants,

Cyp. Car. 283. nothing passed, but the interest remained

Co. Cop. 103. in him that made the surrender; and there

can be no difference where the lord takes

himself by the hands of two tenants;

and if it be in the lord, how can the

copyholder pay the services, or take the

profits after surrender, or make another

surrender.

Ld. Raym.

44.

4 Co. 29. b.

As well estates as descents of copy-

holds are to be guided according to the

rules of common law, as a necessary con-

sequence upon the customary estates. So

that if a surrender be made to the use of

one, he has but an estate for life, unless

there be a custom to the contrary; for by

custom a use limited to one & *assignatis*

suis is good to pass a fee. A surrender to

one & *tribus assignatis suis*, adjudged but

an estate for life; but in some cases estates

in copyhold lands are not guided accord-

ing to the rules of common law. As

where a copyholder in fee surrenders to

the lord, who regrants it in this manner;

Yelv. 16.

Memo-

Memorandum, Quod J. W. cepit de domino Cro. Ja. 434.
ceux terres, cui dominus inde concessit sei- One named
finam habend. eidem J. & Eliz. uxori ejus after the ha-
& hered. eorum in tail; adjudged that bend. may
Eliz. took by force of this copy, though take copy-
she was not named before the habendum. hold estates.
 But it was said, that there was no more Poph. 125.
 grant to the baron than to the feme; and 2 Roll. Abr.
 yet there are the words *cepit de domino cui*
dominus concessit seifinam, which seems to
 amount to a grant. But since the judges
 thought that the baron did not take be-
 fore the *habend.* no more than the wife;
 this case doth not fully prove, that a per-
 son may take that is named after the *ha-*
bend. when there is another only named
 in the premisses; for when both are named
 in the *habend.* only, the admittance would
 be to no purpose, if both could not take;
 and perhaps at common law, if there be 1 Inst. 7. a.
 no body named in the premisses, *habend.*
 to two, they shall both take, else the
 deed could have no effect; but an admit-
 tance to one *habend.* to him and another, Co. Cop. 97.
 may be good; *sed quære.*

An estate-tail in copyholds cannot be Cro. Car.
 created by implication, any more than in 366, 7-
 freeholds; and if in surrenders there be at 1. Brownl.
 first good limitations of uses, and then 127.
 afterwards comes a vitiating clause, such Noy 152.
 clause shall be rejected. 1 Ld. Raym. 44.

Cro. Car. 367. If a surrender be to the use of *J. S.*
 Cro. El. 255. *habend.* after the death of the surrenderor
 for life, this is a void surrender, being
 but one entire limitation; but if the sur-
 render were to him generally, *habend.*
 after the death of *J. R.* *Quere*, If the
 Cro. Ja. 376. *habend.* be void or not. But certain it is,
 Cro. El. 29. that if the surrender be *habend.* after the
 Sand. 151. death of the surrenderor, *ad opus & usum*
 1 Roll. Rep. of his child then in *ventre sa mere*, such
 135. surrender is meerly void; for a copyholder
 March 177. cannot surrender *habend.* after his death,
 and so reserve to himself a particular estate,
 no more than a freeholder can convey so.
 There was a clause in a surrender: And
 if it happen that the child die before his
 full age, or day of marriage, then I do
 surrender the said lands to the use of my
 cousin *J. S.* his heirs and assigns: This
 surrender was held to be void to *J. S.*
 because the contingency did not happen
 in the life of the surrenderor; and a man
 cannot surrender to take effect after his
 death; it was not resolved absolutely that
 a fee may be limited upon a fee. *Vide*
 the book cited in the margin, to explain
 these matters. This case, as reported by
 1 Rol. Rep. 109, 138, 253. *Rolls* (as it is said in *Lex Cust.* 120.) is an
 authority that such future use is good.
 This is the same case as is reported by
Croke, but directly contrary, and as it
 seems

seems not grounded upon so good reason as the resolution in *Croke*; for, as before has been shewn, surrenders are not construed so favourably as wills (though *Coke* Co. Cop. 97. says they should be taken according to the intent of the surrenderor); neither is there the same reason; for a man may as well order a surrender in his life-time, according to the rules of law, as he may any deed to pass away a freehold estate; so that the intention of the party hath not so strong an operation in a surrender, as in a will; and therefore that reason will not support a fee upon a fee in that case, as it doth in a will. And then it is not at all like a use or trust, in which a fee may be limited upon a fee, because there the legal estate was not by any limitation extended further than one entire fee-simple, which would be to extend an estate further than its original creation warranted. But a use, after a use in fee, was but only to give an equitable right to somebody to have the profits, as long as the estate in fee lasted; which is highly reasonable, that a man that hath a legal estate should dispose of the profits of that estate as long as it should last; for so long had he a right to the profits himself, which right he may transfer to others, and there is no harm done to any body;

but to extend the legal estate, would be to keep the lord of the escheat eternally out; and it is only allowed in a will, because of the want of counsel to advise with how to do it. But a use in a surrender is not like this use; for he that hath a use by a surrender is to be admitted to the legal estate, and is not seised to use; and therefore if a fee might be limited upon a fee, in such cases the legal estate would be extended further than its original creation warranted, and a great estate be made out of a little one; so that it seems that a fee upon a fee in copyholds, is not good.

Cro. El. 361. A surrender was to the use of one in fee, upon condition that he pay 100*l.* to a stranger; and if he failed, it should be to the use of the stranger in fee; it was moved, whether this were a good limitation, to add fee upon fee. The court directed the matter to be found specially; and it doth not appear what became of it afterwards; but *B.* conceived the limitation to be good enough, and compared it to a use upon a feoffment; but for the reasons before, it seems it cannot be compared to the case of a feoffment to uses.

Cro. Jac. 374. A copy was granted to the father and his son, he having but one son; this is good

good for the apparent certainty. But if he had many sons, void. Yet *Coke* says, that if a man surrenders to the use of his son *W.* and he has more sons of that name, this uncertainty may be helped by averment. But if a man surrenders to the use of his friend or cousin, this is void, and not to be helped by averment, for the uncertainty. So if the surrender be to the use of *J. S.* or *J. N.* *Coke* in his Copyholder saith, that a man may surrender copyholds immediately to the use of an infant *in ventre se mere*; for that a surrender is a thing executory, and nothing vests before admittance; and therefore if there be a person to take at the time of the admittance, it is sufficient; which seems to be reasonable, and to carry no inconveniency with it; for it is not like a grant at common law; for there there be no body to take, the grant is void, because the estate must be somewhere, and the grant puts it out of the grantor. But in case of a surrender, there is no inconvenience at all; for the surrenderee hath nothing till admittance, but the estate is in the surrenderor. But then it seems, that if the surrenderee be not *in esse* before the admittance, that the surrender will be void; for this seems to be implied by lord *Coke*; for he says,

Co. Cop. 95.

Mo. 637.

cont.
1 Roll. Rep.
109, 138,

203.

that if at the time of the admittance the grantee be *in rerum natura*, that will serve; which implies that the admittance is to be made after the usual manner; Not that the admittance-time shall be put off till there be such a person; for then it would have been to no purpose to have said, that if there be such a person to take at the time of the admittance, &c. for there is no question but that it will serve, if the admittance must be stayed off till there be such a person; and no question but that the grantee will be *in rerum natura*, if the admittance be to be put off; and so he need not have made a question, If he be, &c. And if he never come *in esse*, then the admittance-time will be eternally put off, the old surrender stand good, and no body be able to dispose of the copyhold estate,

Cro. Jac. 376. In the case in *Croke*, no question was
 2 Roll. 791. made but that the surrender to one *in ven-*
 1 Roll. Rep. *tre sa mere*, was good; yet it seems it is
 109, 131. not fully settled, whether a devise to an
 2 Roll. Abr. infant *in ventre sa mere*, be good or no.
 415, 416. *Ideo quære*. However, in the last case,
 2 Bulst. 274. there is no body to do the services till the
 275. birth, and in the former the estate contin-
 ues in the surrenderor, &c.

Co. Cop. 97. A copyholder surrenders to the use of
 1 Leo. 101. the right heirs of J. S. he being alive,
 void;

void; for it cannot take effect *in præsentî*, as he would have it. If a man surrenders to the use of his own right heirs, *quære*, Whether the lord shall not hold it till his death,

A copyholder by licence lets for sixty years, to commence at a time to come; but before that time the lessee enters, and then the copyholder surrenders his reversion, it seems the surrender is void, because the entry before the time was a disseisin, Lit. Rep. 17, 18.

Copyholder for life, remainder to another in fee, the remainder-man surrenders to the use of tenant for life, the remainder to another, though the estate limited to tenant for life be void, yet the remainder over is good, and vests presently. It is made a doubt whether by the destruction of the particular estate, the remainder that is in contingency be destroyed. As to this point we ought to distinguish; for it seems some are, and some are not. As for example; If an estate be given to a copyholder for life, the remainder to the right heirs of J. S. if the tenant for life die, living J. S. there it seems clear that the remainder is destroyed; for it cannot take effect, as by the limitation it ought. But then if tenant for life in that case had committed a for- Sid. 360. Style 251.

a forfeiture, or made a surrender, and then living tenant for life, *Y. S.* had died, it seems to be very clear that his right heir might take; for his estate in remainder was not to take effect after the determination of the interest of tenant for life, but after his death, and when that happened, he was able to take.

2 Roll. Abr.

794.

9. Co. 107. a.

Lane being married and seised of a copyhold in fee, surrenders it to the use of *Dixon* and the wife of *Lane* for their lives, and after to the use of the heirs of the body of the husband and wife; the wife and *D.* are admitted, to them and their heirs; and afterwards *D.* surrenders his moiety to the use of husband and wife, and their heirs; and then they surrender to the use of one *Davis* in fee; then the wife dies, having issue, and then the husband dies, and the heir brings trespass; it was held, that though the husband and wife were admitted in fee, yet that did not alter the estate, but they shall be seised according to the surrender; and then when *D.* surrendered his moiety, this severed the jointure; and then the great question was, What estate the woman had, whether for life, or tail? for if she had only an estate for life, then he that was to take the remainder by force of the limitation; being to be heir of the body

1 Roll. Rep.

238., 317.

438.

2 Roll. Abr.

415.

body of the husband as well as wife, could not take, because the husband was alive; and so the remainder for a moiety was destroyed. But then as the case is put in *Lex Cust.* 122. though it be said that the husband was dead also; yet nothing was said as to his moiety. *Ideo quare* of this. But then if a moiety were executed in the wife, her heir might take a moiety, as heir by her descent. And it was held that there was no execution, but that the remainder was a contingent remainder, and gone for a moiety by the wife's death. This resolution does not at all thwart the distinction before taken, that the remainder should be destroyed; for the estate,

Tenant for life, remainder for life, he in remainder enters on tenant for life, and surrenders; nothing passes; for he is a disseisor. 1 Mod. 199.

that it was limited after, being gone, and the time being come, in which it was to commence; if it could not commence then, it never could. But it is not like the case where an estate for life is forfeited, and the remainder-man cannot then take, but after the death of tenant for life he may. But let us now examine a little into the reason of this resolution. And first, it is very clear that the estate could not be so far executed in the woman, as to destroy the jointure; for that had been apparently to overthrow the design of the settlement. But this does not seem any good ground to conclude that therefore heirs

heirs in that case should be a name of purchase. For if an estate be limited to two, and the heirs of one, though the jointure be not severed, and to that intent the fee not executed, yet *heirs* are there words of limitation, and not of purchase. Then let us examine a little farther, and see what could be the ground the judges went on to think that the rule, when the ancestor takes an estate for life, &c. can have no operation. Indeed the case has this particular in it, That the heir, who is to take, is not only to be heir of the ancestor, who hath the tenancy for life, but to another person who took no estate at all; and so it seemed the design of the party to settle one intire interest in such a one: And there appears no footsteps of his intent, to make him take one moiety by descent, and another by purchase. But notwithstanding this, there seems to be a manifest inconvenience in the resolution; for if it be construed a contingent remainder, then we suppose a deed made, and an estate given; where, at the very first it appeared, that for one moiety, the deed and estate could have no manner of effect, unless the husband and wife died both at one nick of time; for if the husband died first, then the person who was to take, being to be heir of the wife, and she

the being alive, &c. and so *vice versa*. But if we construe it to be executed in the wife, so far as to make it an estate-tail, though not to destroy the jointure, there the deed will have an operation; for one moiety it will be executed in the wife, and when she dies, the heir of her body by her husband begotten will inherit to that moiety, as heir to her; and as for the other moiety, it will be a contingent remainder to vest in the heir of the husband, if he die living the particular tenant. And in this case the estate being made over to him, and by him conveyed to another, nothing but an estate for life could pass by that surrender. But then if it were for the life of the surrenderee, and then the husband died, the contingent remainder was gone. By this construction the intent of the parties and the rule of law is satisfied. And according to this construction was a case adjudged, where a surrender was made to the use of the wife for life, remainder to the right heirs of husband and wife. Here the opinion of the court was, That a moiety was executed in the wife, and that upon her death her heir should have a moiety; and that if the husband had died first, his heir should have had a moiety. This case is directly contrary to that next preceding,
and

and seems to be grounded upon better reason. But *quare* well, Whether that case be reported as it is said to be; for he saith, that *Coke* held the estate-tail to be executed in that case, but that the reporter conceived the contrary; and yet before, in *Lex Cust.* 121, 122. he tells us, that *Rolls* conceived that a contingent remainder was not destroyed by the destruction of the particular estate. The case before proves that the rule, where the ancestor takes an estate for life, &c. takes place as well in copyhold as freehold estates; and indeed what reason can there be why it should not; for if it be reasonable in freehold lands, why not in copyholds; for the rule takes not its rise from the nature of the land; and it is regularly true, that estates and descents in copyhold lands are to be guided according to the rules of common law.

Style 249,

271.

2 Roll. Abr.

253.

1 Inst. 8. b.

A. seised of a copyhold in fee surrenders it to the use of his last will, by which he devises it to *B.* for life, and after his death to the heir of his body begotten, for ever; it is said to be adjudged (*Lex Cust.* 124.) that *B.* had a fee executed in him; but it seems that must be meant of a fee-tail, because the heirs are restrained to the body of *B.* This case does not at all contradict *Coke*, who says, that

that if an estate be given to a man and his heir, he hath but an estate for life, for that is meant by feoffment, &c. for he himself says, in the next folio, that if a man devise land to a man *in perpetuum*, it is a fee. And here the devise was to a man and one heir *in perpetuum*, which sure will create a fee, as well as where the word *heir* is left out; but because it is added *heir of his body*, it seems the design was to give a lasting fee-tail. Neither is it like *Archer's* case, where the devise was to one for life, and after to his heir male; and to the heirs male of the body of such heir male; for there there wanted the words *for ever*, to give a fee-tail to the first tenant for life; and besides, there the inheritance is by express words given to the issue.

Husband seized of lands in fee makes Dyer 99.
a feoffment to the use of his wife for life, and after her decease, to the use of the right heirs of the bodies of him and his wife engendered; they have issue; and the wife dies; and the *quere* in the book is, Whether the issue may enter in the life of his father, or after his decease. And then the book goes farther and says, *Et come semble newry*, because he cannot be right heir of the body of his father, living his father. This case, as far as it is
an

an authority, coming in only by a *confe*
femble of the reporter, is against the opi-
 nion in the preceding page, and seems
 to be unreasonable; for unless the limi-
 tation to the heirs be executed for a
 moiety in the feme, it is impossible it
 should be of any effect; for if the hus-
 band dies first, the reversion will descend
 to the heir, which will be preferred be-
 fore the contingent remainder, that is to
 take effect upon the death both of him
 and his wife; and if the wife dies first,
 and then the husband, the contingent re-
 mainder is destroyed, because it could not
 take effect upon the death of the tenant
 for life.

1 Leo. 101.

When a copyholder surrenders to the
 use of himself for life, and then a limi-
 tation is made to his right heirs, these
 are words of limitation, and not of pur-
 chase; but when a stranger takes an estate
 for life, and after a limitation is to the
 right heirs of the surrenderor, there, ac-
 cording to *Coke*, heirs are words of pur-
 chase, and not of limitation; and the rea-
 son he gives is, because the estate is out
 of surrenderor; which it seems from what
 has been said before, it is not. But yet
 when the surrenderee is admitted, he is
 in by relation from the surrenderor. *Ideo*
quare. According to *Coke*, if a copy-
 holder

holder surrender to the use of his own right heirs, the lord shall hold the land during the life of the surrenderor. *Quere* of this.

A copyhold, demisable for three lives, *Mo. N. 922.* was demised to one for life, the remainder to another for life, and then to the first son of the woman he should marry; these two remainders not being warranted by the custom, are void; for that warrants only one estate with several limitations, but the first estate for life being warranted by the custom, is a good estate.

A man seised of copyhold lands, devised a certain parcel of them to his wife for life, the remainder to his brother and his heirs, and afterwards, in presence of three persons of the court, said to them, I have made my will as I will have it, and here I surrender all my copyhold lands; *Lee. 18.* into your hands accordingly; not all his copyhold lands are surrendered, but only those mentioned in his will; for he had respect to that, in making his surrender; and he said he surrendered all his copyhold lands accordingly; which shewed his intent was only to pass those lands that were devised by his will. Here was no question about the validity of the surrender, which was only by parol, and into the hands of three tenants of the court;

T.

but

but it is not said in court; and indeed the case cannot well be supposed to be in court; for then the surrender had been to the lord or steward, and there can be no reason why a surrender in court by words should be of more validity than a surrender by words out of court.

2 Bult. 274. **Cro. Jac. 199.** If a copyholder surrenders to the use of his last will, and therein nominates and appoints that such a one shall have the land for life, and after his death gives authority to sell the lands; in such case they may be sold without any new surrender; and the vendee shall come in by the will, to which purpose the first surrender is sufficient.

Lit. Rep. 23. Copyholder in fee surrenders to the use of his last will, which he said he would leave with his partner *Moss*; *Moss* dies; he recites the surrender, and makes his will; it seems the devisee shall have the lands; for these words, That he would leave in the hands of his partner *Moss*, are only words of demonstration, and no way operative or restrictive of the operation of the surrender or devise. And it is a rule in law, when an act is to be done, with reference to another thing, which is impossible, illegal or variant, the act shall stand, and the reference be void.

A copyholder in fee devises it to his wife for life, and that she should sell the reversion for the payment of his debts; and afterwards he surrendered the lands to the use of his wife for life, according to the will and deed. Adjudged she might sell the lands, because in his surrender he referred to his will, and afterwards she surrendered upon condition to pay 12*l.* this was held to be a good sale, according to the will.

Cro. El. 68.

Two jointenants, one surrenders his moiety to the use of his last will, and dies before the surrender is presented, but after he made his will, this is a severance of the jointure; for being presented, it relates to the time of the first surrender.

Cro. Jac. 100.
1 Inst. 59. b.

A copyholder surrenders to the use of another, who, before admittance, surrenders to another, who is admitted; no interest is hereby vested in him; for the first surrendered had nothing in him to give over; and the admittance of the second surrenderee, amounted not to an admittance of the first; but an heir may surrender to the use of another, before admittance; for he has the legal estate and interest in him. A copyholder may surrender to the use of another upon condition, that if the surrenderor pay such a sum of money, at such a day, the sur-

Yelv. 144.
145.

1 Roll. Abr.
585. cont.

3 Bull. 230.
cont.

Cro. Jac. 36.
1 Roll. Abr.
499.

render to be void. After the admittance of such surrenderee, if the surrenderor pay the money, he may re-enter, and shall have the land without any new admittance, or any new fine; for he is in of his old estate. So he may surrender, reserving rent; and that if the rent be not paid, he may re-enter; and there no fine or admittance is to be had. But in case where the day of payment of money by the surrenderor is past; so that he hath only an equity of redemption, there it seems he must pay a fine, and be re-admitted.

Cro. El. 361.

A surrender was upon condition to pay 100*l.* to a stranger, he tenders the money, and the stranger refuses; the question was, Whether the condition be saved? and it was the opinion of one justice, that the condition was saved; the other justices directed it to be found specially. This case seems now to be beyond all doubt, that the condition is saved; for it was the design of the parties that the surrenderee should retain the land; therefore if a feoffment be made in fee on condition, that the feoffee shall grant a rent-charge to a stranger, if the feoffee tender the grant, and he refuse, the condition is saved.

1 Inst. 209. a.

A copyholder surrenders to the use of J. S. paying his executor 100*l.* this is a present surrender; for otherwise it can be of no effect. A copyholder in fee surrenders to the use of his son in fee, upon condition he keep the covenants in such an indenture, and pay 10*l.* The son surrenders to the use of another in fee, but neither keeps the covenants nor pays the 10*l.* the father enters, and dies seised, the son enters as heir to him, and the surrenderee of the son enters upon him; but his entry was adjudged unlawful; for by the father's entry for the condition broken, the whole estates, both of his son and his surrenderee, were defeated. 2 Bull. 275. Cro. El. 239.

An infant surrenders copyhold lands, he may at full age disagree and enter; for in case where an infant makes a feoffment in fee, he may enter, much more in case of a surrender; for a feoffment is a conveyance, which will work a discontinuance, but a surrender will not. A feme covert may surrender, being solely examined by the steward: And if there be a custom for her to be examined before two tenants out of the manor, it is good. A surrender to the steward to the use of the steward is good, to give the steward an interest; for the surrender is in truth to the lord, and not to the steward.

1 Leo. 2.

ard. A copyholder surrenders to the use of *A.* in trust, that he shall hold the land until he hath levied certain monies, and that afterwards he shall surrender to the use of *B.* the monies are levied, *A.* refuses to surrender, *B.* exhibits his bill to the lord of the manor against *A.* who, upon hearing the cause, decrees against *A.* that he shall surrender, *A.* refuses, the lord may seise and admit *B.* for he is chancellor in his own court.

It seems that the presentment of a surrender in court, is only by way of instruction, to let the lord know of the surrender, and accordingly he may admit; for it is apparent that a presentment is not of necessity, because the lord may admit out of court; and any act of the lord's consenting to the surrender will amount to an admittance, which plainly shews that a presentment is only to shew there was such a surrender; for if it were of necessity, then there could be no admittance out of court, nor no act implying the lord's consent would be *tantamount* to an admittance; and then if we go to the reason of the thing, since the estate is only to be surrendered to the lord, and by him transferred to the surrenderee, if he accept the surrender, and grant an admittance, which is all that can be done,
what

what need is there of a presentment, and of what use can it be, for the homage to present a surrender, in order for the lord's admittance, when the lord may take notice that there was such a surrender, accept it, and admit accordingly. The estate, as it was derived from the lord, so it must be surrendered to him, and the presentment makes no part either of the surrender or admittance: In itself, it is nothing but a notification that there was such a surrender, which if the lord takes notice of, without a presentment, it frustrates the end of a presentment, and the presentment is no ways of use. Therefore it seems, that if a surrender be made, and then a wrong presentment be made of this surrender, and then admittance is made according to the surrender, that this is good; for only the presentment can be void, and then there is an admittance upon a surrender, without any presentment, which, for the reasons before, seems to be very good. It is said in *Lex Cust.* 137. that a surrender must be presented by the same persons that took it. So says *Coke*, but that this is not literally true, will appear from what he says in another place, that if he that took the surrender die, yet if presentment be made of it, it is sufficient; and it is said in *Lex Cust.*

Co. Cop. 105.
Cro. Jac. 403.
4 Co. 29. b.

Of customary and

to have been held by *Wadham Windham*, that if a surrender be made to one tenant, and presented to have been made to another, yet that is nothing to vitiate the surrender; if the surrender be presented by any body, and admittance thereupon made, it seems to be well enough; for it is known that there was a surrender; and if the presentment should be void, yet the admittance is good enough without it.

Presentment, by the general custom of manors, ought to be made at the next court-day; but by special custom at the second or third court-day; the reason of this seems to be to prevent disputes; for if an old surrender might be trumped up at any time, it would defeat any after charges made by him that surrendered, which charges would appear to be good enough, since he is tertenant, and continues possession, and the surrender could not be known. But now let but the purchaser stay a court or two, and then he may be sure to know whether there is any incumbrance; for if the surrender is presented, then it appears, and he need not meddle; if it be not presented, he knows it is void, and so may proceed.

A surrender is made by a copyholder upon condition, for payment of money, and then he makes a second surrender, and

Co. Cop. 105.
Style 257.

Cro. Car.
273, 283.
Burgoin v.
Spurling.

and then a third; but between the second surrender and the third, he paid the money; and the question was between the two last surrenderees, Who should have the land, their two surrenders being only presented, and not the first; no court being held till after all the surrenders? And it was adjudg'd for the second surrenderee; for till presentment he had the whole estate in him; and it is said in the case, that if the surrender had first been presented, all mean acts had been void; but because that surrender was not presented, it was void. It seems this must be understood if the money had not been paid, or a court had been held before the money was due, and there the surrender had been presented; for it seems the presentment of the first surrender, after the payment of the money, had been void, because the surrender was void then, and a void surrender cannot be presented; and until a surrender be presented, it cannot bind the interest of the land; *sed quære.*

If a copyholder die seised, and the lord admits a stranger, this is no disseisin to the copyholder, but he is tenant at will. Leo. 310.

There are two cases which seem to be directly against admittances by implication; the one is, If a copyholder surrenders to the use of another, and the *cestuy que*

Of customary and

que use before admittance surrenders to the use of another, and the lord admits him, that this is no admittance of the first *cestuy*

Cro. Ja. 403. *que use*. The other is, A copyholder surrenders to the use of another, and he enters and pays rent to the lord, that this is no admittance of *cestuy que use*; and the reason given is, because the custom (of surrendring into the hands of two customary tenants, and presenting it at next court) is strict and ought to be pursued.

But however there are cases of admittances by construction and implication, without any express admittance; and as the

1 Rol. Abr.

505.

2 Sid. 61.

the last case is reported by *Rolls*, it is said that the acceptance of rent out of court from the *cestuy que use* (the lord knowing of the surrender) is an admittance in law; yet as the case is reported by *Croke*, judgment is given for the lessee of the heir of the surrenderor. If we look to the reason

3 Bulst. 230,

215, 216.

of the thing, we may conclude, that any thing that expresses the lord's consent to the surrender, should amount to an admittance; for it is his consent only that is requisite after the surrender, to make the surrenderee a tenant; and what matter is it whether that be done by a *dominus concessit & admissus est*, or by any act that amounts to as much. There is a case in

1 Rol. Abr.

505.

Rolls too, where the surrender of a person

son before admittance, and acceptance of the lord of the surrender, was construed to be first an admittance, and then a surrender; for the lord, by accepting the surrender, implies he admits him able to make one. And by the same reason, that the acceptance of a surrender before admittance amounts to an admittance, the admittance of such a surrenderee's surrenderee is a good admittance of the first surrenderee. If a fine be accepted of one as ³ Bulst. 237. a copyholder, this amounts to an admittance. Accepting rent from the hands of the two tenants into whose hands the surrender was made, doth not amount to an admittance of *cestuy que use*, because the lord may receive it of them without designing thereby any thing to a third person; but if he takes it from them as from ³ Bulst. 215. *cestuy que use*, it is an admittance. This is the same case as that reported by *Croke*; but *Croke* reports it, that acceptance of rent of *cestuy que use* is no admittance; *Rolls*, that it is an admittance (the lord knowing of the surrender). *Bulstrode* reports it as paid by the two tenants, into whose hands, &c. and then says, it is no admittance; but if he had shewn that the lord had accepted the rent as of his copyholder, then he saith it had been a good admittance.

Lessee

1 Inst. 59. b.
Cro. Car. 556.

1 Ld. Raym.
658.

1 Leo. 288.

Poph. 127. 8.

Lessee for life, years, or will, of a manor, accepts a surrender, and then his interest determines, the next lord shall be compelled to admit. It seems if a steward have his office *exercend. per se vel sufficient. deput.* he may exercise by deputy, though there be no custom. *Sed quære*; but if that clause be not in, it seems he cannot make a deputy, because it is an office of trust; But any act of service may be done by one as servant to the deputy, *a fortiori* to the steward, as to take surrenders, make grants by copy, and admittances.

The entry of *compertum est per homagium* doth not make an admittance, for that only shews there was a surrender, but implies no assent to the surrender; but the entry of *dat domina pro fine & fecit domino fidel. & admis.* that is the admittance. It is said that in this case the surrender was presented, and the surrenderer accepted, and a copy granted him, and he surrendered again; and this surrender was presented, and a copy granted, and he accepted as a copyhold tenant: In this case nothing is said to be resolved, but the court said that he, to whose use the surrender is made, had not any estate before admittance; but they said nothing to the point, whether he were admitted,

or

or not. But it seems that in that case there is a very good admittance; for he was accepted as tenant; and I should think it was that made him tenant, and not the entry of it in the roll.

If one who hath a tortious estate takes a surrender, and his estate end before admittance; *quære*, Whether the right owner shall not be compelled to admit, since he is compellable to take such surrender.

A copyholder surrenders to the use of ^{2 Sid. 37, 61} another and his heirs, the *cestuy que use* dies before admittance, his heir being beyond sea; one comes and is admitted in the name of the heir, who consents; this is a good admittance. But it seems the lord is not compellable to admit by another, because the corporal service of fealty is due to him. If a surrender be to the use of *J. S.* and *J. N.* is admitted; and *J. S.* consents, this is a good admittance; *quære* of its

A copyholder in fee dies, his heir enters and makes a lease, the lessee may maintain *ejection firmæ*, without the admittance of his lessor, or presentment that he is heir. But it was held in the same case, that thirty years having incurred between the death of the copyholder and the making the lease, that being his own default, should hinder him of the power
of

of making the lease, had he not shewn good matter to have excused the default. The reason of this seems to be, because the law casts the estate upon him by descent, and so enables him to make a lease, lest otherwise there being no court held in a great while, he should lose the profits of the lands; and so the law casts the estate upon him, and helps out the defect of an admission; but yet only *pro tempore*; and therefore the heir must be admitted; for an estate at will is not in itself descendable; therefore where the heir is guilty of a supine negligence, the reason for the law's casting the estate upon him ceases, and it will reckon no estate in him; and consequently he cannot demise. That which excused the admittance for nineteen years, was non-age in the heir; for it was resolved that the heir during his non-age, was not bound to pray admittance, or tender his fine. And if the death of the ancestor be not presented, nor proclamation made for the heir to come in, &c. he is not prejudiced, 4 Leo. 30, 31. though he be of full age.

A copyholder of inheritance of a manor of the king's is ousted; no estate is gained hereby to the wrong-doer, but only a bare possession. My lord Coke says, peradventure if a copyholder lan-

guishing

giving in *extremis*, surrenders out of court to the use of his cousin, or to any other upon consideration of affection, blood, or the like, and recovers his health before presentment, this surrender is revocable; but by his saying a surrender out of court, it seems, if it were made in court, that it were not revocable; for then he shewed a more settled design, and by his saying before presentment, it seems that if it were presented, it were not revocable; for then the land is bound. By *Leo. 100. Wray*, if a copyholder surrenders in *extremis* to the use of himself for life, &c. this surrender shall stand, because of the estate reserved to himself. This seems plainly to warrant the aforesaid opinion of *Coke*.

The lord may avow upon the heir for rents and services before admittance, but he is not compleat tenant before admittance, for he cannot maintain a plaint in nature of an assise before admittance; but it seems he may have assise of Mortdancer upon his ancestor's admittance. *Quere*, Whether a feme be so seised to make her husband tenant by the curtesy before admittance, where the custom is for tenancy *per curtesy*. It seems reasonable it should make the husband tenant *per curtesy*, as well as the possession of the

Co. Op. 112.
Mo. 272.
cont.

Moor 172.
1 And. 192.

the brother before admittance make the sister heir; and by the same reason the widow shall have her widow's estate, tho' her husband was not admitted.

1 Keb. 25.

1 Ld. Raym.

76.

If there be a custom to surrender out of court into the hands of two customary tenants, a surrender to the heir of a copyholder before admittance is good. If a copyholder of inheritance surrenders this to the use of another, and his heirs, and the surrenderee die before admittance;

2 Sid. 37, 61.

1 Rol. Abr.

627, 807.

1 Mod. 102,

162.

quare, Whether his heir be in by purchase or descent. It was the opinion of justice *Newdigate*, that he was in by purchase; and according to this is *Rolls*. But the opinion of *Glyn* was, he was in in nature of a descent; and so are some other

Quere, & vide

1 Rol. Abr.

502.

opinions that are more late. Therefore it was held, if land of the nature of borough *English* be surrendered to one and his heirs, and he die before admittance, that the youngest son shall be admitted;

2 Ld. Raym.

1026, 28.

and this opinion seems to be very reasonable, for *heirs* were in the limitation certainly as words of limitation, and not of purchase; and certainly there is as much reason to adjudge the heir in by descent here, as there is to adjudge an heir in by descent where a recovery was had against the ancestor, but not executed till after his death; because the use might have vested

1 Co. 106.

vested during the life of the ancestor ; and because the execution hath a retrospect ; and in truth the case of a surrender is just the same, for admittance might have been in the life of the ancestor ; and when it was had, it had a retrospect.

One jointenant copyholder releases to his companion ; this is good, because both were admitted to the whole. A copyholder in fee surrenders into the hands of the lord, to the intent the lord should grant them *de novo* to him for life, and then to J. S. his wife, during the nonage of the son and heir of D. the copyholder, then to the son in tail ; the copyholder died, and then the lord granted the lands accordingly to the wife, during the nonage of the heir, he being then but five years old ; the wife took another husband and died ; the husband by the opinion of two judges was to have the land during the nonage of the heir, without any new admittance ; if so, then it seems he shall pay no fine, for a fine is due upon the admittance. By the same justices, if there be a copyholder for years, and he dies, his executors shall have the term without any new admittance. But *Weston* to the contrary. But however the opinion seems reasonable, for they continue the

U

possession

Winch 3.
3 Leo. 9.
Dyer 251. a.

possession of the testator, and have it only to his use.

Cro. El. 349.

Cestuy que use cannot enter or have trespass against any body without admittance, unless there be a special custom for it. There is a case in *Yelv.* 16. where it is said upon motion to the court, it was agreed by the four justices, that if a copyholder surrenders to a stranger, and the steward will not admit him, and the stranger enters and occupies the land; and the lord lets to another to try the title, and he brings ejectment, the occupier may plead Not guilty, and it shall be found for him; and then the report of the case goes on, and it is said, *quere rationem*; for if it be in respect of the possession, it seems the title of the lord is elder, by reason he has right and title to the freehold, &c. and then it is said, *quere*, Whether the reason be not because the lord is *particeps criminis*; for it shall be intended that he would not let the steward admit. Then the report goes on and says, *Nota*, the surrender was but of a copyhold to him, & *tribus assignatis fuit*, so that by his death the estate in the copyhold determined, &c. This is a very strange report, for the *queres* and reasons of the case confound it. It seems
to

to me, that the reason of the case was, because that after the surrender, the estate continued in the surrenderor, and not in the lessee; and so the possession of the surrenderor was illegal against the surrenderor; yet it was good against every body else, and so against the lord's lessee; for when the lord refuses to admit, the way is to compel him in chancery; and no action upon the case lies against the lord for non-admittance. It is said in *Lex Cust.* 158. that an action lies for the surrenderor; *sed quare*; indeed the reason given was, because the surrenderor hath no interest which the surrenderor hath. It seems, if a man enter into his wife's lands, and makes a lease, and she dies before admittance, yet the lease made is good. The issue in the case between *Wheeler and Haver*, was, Whether the fine to be paid by copyholder was certain or uncertain; and the verdict was, that they were certain. In this case it was held by two justices, and denied by no body, that debt lay for the lord for his fine. It seems it lies in any case; for the verdict finding that copyholders ought to pay a fine certain, did not any more entitle the lord to his action of debt, than he was before. And it seems to me, that if upon demand he refuses to pay the fine,

Tottil 65.
1 Roll. Rep.
125, 195.
2 Bull. 236.
Cro. Ja. 368.
Mo. 842.
1 And. 192.
1 Sid. 58.

1 Sid. 58.

Ser. 447.

Of customary and

it is a forfeiture. It is made a *quare* in that case, Whether if a copyholder in fee die, and his heir waves the possession, and refuses to be admitted, whether the lord shall have debt for the fine; and the reporter thinks he cannot wave the possession, which to me it seems he may do in court of record, or in that case of copyhold lands in the lord's court; and if he may do it, then no fine is due.

1 Inst. 59. b.

Coke says, treating of fines, that some be by alteration of the lord, and some by alteration of the tenant; but that a custom to pay a fine at every alteration of the lord is not good; but a custom to pay upon the death of every lord is good. *Quare*, Whether a fine be due of common right upon the alteration of the lord by death; it seems it is not, but only where there is a particular custom for it; though my lord *Coke's* words are general, and may be interpreted either way.

1 Keb. 15.

It is said to be resolved in *Keeble*, that if the lord reserve rent upon a lease for years of the freehold of the copyhold, the reservation is not good. The meaning of this must be, either that the lord reserves a rent upon a lease of the freehold of the copyhold lands, or else that he reserves the copyhold rents to himself, so that the lessee shall not have them; in both

both which senses the case seems unreasonable; for in the last sense I can see no reason why he should not reserve the rents as rents-sock to himself; and in the other case surely the reservation must be good, for it seems to be a grant of the reversion for so many years; for by force of such lease the lessee will have all the services of the copyholder, and take advantages of forfeitures, in respect whereof a rent may be reserved. Therefore, where it is adjudged that where a lord made a lease for years, to commence after the determination of a copyhold estate for three lives (where the custom was for a woman to have her widow's estate) that the lease should commence presently in point of computation, though not in point of interest; it seems that must be understood of interest in possession, for surely such a lessee shall have the services, &c.

Infant copyholder makes a lease for years, and at his full age accepts the rent; this makes the lease good: Such a forfeiture shall not bind an infant, no more than if being tenant for life of freehold lands, he makes a feoffment in fee; but if he accepts the rent after full age, then the forfeiture shall bind him, as it seems. It seems the lord may enter for the forfeiture during the nonage, and need not

4 Co. 27.

Cro. El. 491.

Noy 92.

Latch 199.

Roll. Rep.

256.

3 Co. 44.

stay to see whether the infant will accept the rent or no, for the particular prejudice done to the lord; and if he should stay his acceptance of services from the infant, in the mean time it would be a dispensation for the forfeiture. But then the infant at his full age, by disagreeing to the lease, may avoid the forfeiture. Custom that upon payment of ten years rent, the lord shall license to let for ninety-nine years; and if he will not license, the tenant may let without: Adjudged a good custom; yet the licence seems unnecessary here, since it may be done without it.

2 Keb. 344.

2 Rol. Abr.
450.

Lord of a manor grants a copyhold, rendering rent *præfat. domino & servitia de jure debita & consueta*. This rent shall go to him, his heirs, and assigns; *sed quæro*; for in case of freehold lands it is

1 Inst. 47. 2.

extinct by the lord's death; otherwise if the reservation were generally made, and not to him. The reason of the diversity may perhaps be, because of the clause *& servitia prius debita & consueta*; which seems to intend the continuance of the services, during the lease; for else the grant of the copyhold will not bind the heir; and it seems to be the design of the grant of the copyhold to be good during the term. And though less services are reserved

reserved than usually were, that thereby the grant may be avoided; yet the intent and purport of that clause *per servitia prius debita & consueta*, seems to be to continue the rent during the estate, because rent was a *servitium prius debitis & consuet.* though not so little rent; and if more be reserved, then the rent must be paid also, during the whole term, by force of that clause, because rent used to be paid; and though not so much, yet that being the only rent reserved, and the old services being to be continued by force of that clause, the whole must be paid, for that seems the intent of the parties, and there is no ground for an apportionment. But then if no rent have been used to be paid, *quare* of that. But grants of copy and surrenders are not construed as deeds are, but have a more equitable construction, and therefore it may be good in such case. This distinction is taken in *Popham*.

Poph. 188.

A copyholder made a lease for years by licence, the lessee dies; this shall not be accounted assets in the hands of the executor; otherwise if the lease had been for but a year, because this is an estate at common law, and the other but a customary estate; *sed quare*, whether the executor be not compellable to pay debts

with

with the profits; for though the estate be not extendable, yet it is unreasonable he should take the profits to his own use, while debts go unsatisfied. It seems by this distinction, that a lease for a year of copyhold lands is extendable; and indeed it may as well be in the hands of a creditor for a year, without the lord's licence, as in a lessee's hands. It is true, copyhold lands are not assets in the hands of the heir, for it is nothing but custom that makes an estate at will descendable; and therefore unless there be custom to make them assets, they partake only of the qualities of an estate at will, which is not to be assets; and it is sufficient for the heir to plead *riens per descent*; and therefore the profits of the lands shall not be assets in his hands, because not descendable. But though the term it self cannot be assets in the hands of the executor, for the reason aforesaid; and also because it cannot be extended; yet the profits when received may be assets, for then they are chattels, and partake no more of the nature of customary lands; and therefore it seems reasonable they should be assets in the hands of the executor; *sed quare*.

Cro. Ja. 436.
 Noy 121.
 Poph. 105:

The lord licenses the copyholder to let for five years, and he lets for three, this is good; so if the lord license the copyholder

copyholder for life, to let for five years, if the copyholder so long live, and he lets for five years absolutely, this is a good pursuance of the licence, for the limitation is implied by law, and so need not be expressed; but otherwise it is, had the limitation been during the life of a stranger, had the copyholder had a fee. *A.* hath a licence to let for twenty-one years from *Michaelmas* last, and he makes the lease to begin from *Christmas* next; this is not warranted by the licence. It was the opinion of my lord *Dyer*, that if a lease be made of freehold and copyhold lands together, rendering rent, that the rent shall issue only out of the freehold, because the lease of the copyhold lands is void, and because they are of no account in law, and so may be compared to a lease of lands and goods; the rent issues out of the lands, and not the goods. But in the case of *Collins* and *Harding*, it was held that the rent issued out of both, for copyhold lands may be distrained upon. This opinion seems very reasonable, for the lease is good against every body but the lord, and is not a void lease; for if the lease were only made of the copyhold lands, surely the lessor has remedy for the rent; and then the joining freehold lands with

Cro. El. 394.
Moor 50.

Mo. 554.
Cro. El. 607.
622.
1 *Roll. Abr.*
426.
1 *Roll. Abr.*
234.

with the copyhold can make no alteration.

1 Leo. 315.

A copyholder makes a lease by licence for years, rendering rent, and then grants the rent over to another by deed; the lessee attorns; it was held to be a good grant of a rent-sock, but that the grantee could not have debt, because he was not privy to the contract, neither hath he the reversion. Lessee for years of a manor grants licence to sell timber; it seems this is good during the years; so that neither lessee nor lessor can take advantage of the forfeiture. Not lessor, for thereby the lessee of the manor would lose the services of his tenant; for he is the lord of whom the copyholder holds, and therefore he must take advantages of forfeitures, if any body can, which in this case he cannot do because of his licence; but then when his interest is determined, since there is a prejudice done to the inheritance of the manor, it seems the lessor may take advantage of the forfeiture, for the licence determines by the expiration of the years. When a lord grants a licence to sell timber, and then grants his interest over to another, this determines the licence; for the licence is but a dispensation with the forfeiture, and gives no property; but the property being transferred

1 Keb. 26.

ferred to another before the selling, there must be a new licence to sell, because he is not party nor privy to it; but if the lessee sell timber after such an alienation of the manor, it is no forfeiture, *sed quare*.

If the copyholder makes a lease for years by the lord's licence, the lessee may assign over his lease, or make an under-lease for years without any new licence; for the lord's interest is discharged for so many years. Roll. Rep. 509.

Lord at will cannot give licence to let for years; for he cannot discharge the lord's interest any farther than his own interest in the manor goes; and therefore if the lord that gives the licence has but a particular interest in the manor, the licence is determined upon the determination of the lord's interest. The lord gives licence to lease upon condition; the condition is held in *Owen* to be void; *sed quare*. A copyholder makes a lease for years with licence, and before the years expire dies without heir; some are of opinion the lord may enter, because the estate out of which the lease was derived is determined; others say the licence shall be taken as a confirmation. 2 Brownl. 40. Owen 73. Poph. 188.

A copyholder in tail accepts a feoffment; this destroys not the custom as to his

his issue in tail, for he hath no power to conclude him; yet if he commit a forfeiture, and the lord seises, it seems his issue is bound, it being a common and customary way to cut off the entail of copyhold lands. If one seised of a manor in right of his wife, let lands by indenture for years, this does not destroy the custom, as to the wife; for after the death of her husband she may demise it by copy again. And by the same reason it seems her heir may; so if tenant for life of a manor lets a copyhold parcel of the manor for years, and dies, this shall not destroy the custom, as to him in reversion. Copyholder accepts to hold his land by bill, under the lord's hand; this determines his copyhold. So if he accept an estate for life, by parol, if livery be made; otherwise not; for else nothing but an estate at will passes, which cannot merge an estate at will.

Hutton 81. If a copyholder releases to his lord, this extinguishes the copyhold. So if the lord sell the freehold of the inheritance of the copyhold to another, and then the copyholder releases to the purchaser, this extinguishes the copyhold interest. But if the copyholder be ousted, and thereby the lord disseised, and the copyholder releases to the disseisor, this is of no effect.

Str. 1197.

Cre. El. 459.
598.

1 And. 199.
Latch 213.

Hutton 81.
1 Keb. 808.
1 Leo. 102.

effect. The reason of this seems to be, that though a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's mind to hold the land no longer; for a copyholder is a tenant at will, and therefore, though the possession be not granted, any thing amounting to a determination of the copyholder's will, is sufficient to extinguish his copyhold. So if tenant at will, of freehold lands, grants his estate over, though nothing passes, and the grant is void, yet it amounts to a determination of his will. But then as to the last case of the disseisor, no right to a copyhold estate is extinguished by release, but where the person that hath the copyhold estate comes to it rightfully, because of the prejudice the rightful lord would be at; for in this case he would lose, in his damages against the disseisor, the fine due for admittance; and there would be a tenant brought in against his will, and an estate at will grantable by surrender only, pass by disseisin and release. This case is not therefore, to be compared to the case where tenant for life releases to him in the reversion, this is of no use; for it cannot be construed to be a surrender; and as a release it cannot operate, and so it is of no effect; but in our case, if it be but a declaration

Cro. El. 21.

1 Inst. 57. a.

4 Co. 25. b.

1 Leo. 102.

Cro. Ja. 169.

Hut. 81.

2 Leo. 73.

declaration of the copyholder's intent to be no longer a copyholder, it is sufficient. A copyholder bargains and sells his copyhold lands to the lord of the manor, who is only lessee for years, the copyhold is not extinguished; for the lessee is lord of the manor, and so the lands are always demisable by copy. And there can be no difference between this case and where the manor is conveyed away, together with the copyhold at one and the same time.

Three sisters copyholders for life *successive*, the eldest tenant in possession takes husband, the lord by indenture makes a lease to the wife, the remainder to the husband, remainder to the second sister, who four days after the making the lease, agreed *in pais*, and then took husband, and entered; and the first question was, Whether the agreement did extinguish her copyhold estate? And the opinion of the justices seemed to be, it did not; but judgment was given against the younger sister; for the eldest sister not being dead, she could not enjoy her remainder, that being to commence after the death of her sister. Now this judgment might be given, and the first point be left undetermined; for if her copyhold estate were extinct by acceptance of the remainder, then to be sure her entry was not lawful; and if it

it were not determined, yet it was held the younger sister's remainder could not take place, because, according to *Margaret Podger's* case, the remainder was not to commence till after the estate for life ended; *sed quære* farther, whether the younger sister's remainder be not in this case destroyed; for the estate for life of the eldest sister is utterly gone; for the lord having made a lease, can take no advantage of the forfeiture, and then the remainder not commencing when the particular estate ends, it seems it can never commence; for there is as much reason to destroy contingent remainders of copyholds as freehold estates; and this is not like the case where the lord seises the particular estate as a forfeiture; for there it remains (as it seems) to support remainders. Husband and wife, copyholders in fee, the husband obtains of the lord, for money paid, an estate to them in tail; the husband dies, the wife enters and suffers a recovery, the heir enters upon her by force of the statute 11 H. 7. and his entry adjudged lawful; for by her acceptance of the freehold estate, the copyhold was extinct. Custom that copyhold tenements should be to the wife after the husband's death, either for a moiety or intiertry; they escheat to the lord; and he dies; his wife shall not

1 Rol. Abr.

505.

1 Brown. 153.

9 Co. 107.

LexCust. 231.

Cro. El. 24.

2 Sid. 19.

2 Sid. 18,

141.

March 206.

Style 266.

2 Roll. Abr.

197.

Jones 449.

cont.

not be endowed of a moiety; for they are not copyhold in his hands.

The king, lord of a manor, and having copyhold lands in his hands, grants them to one for life, without taking any notice that it is copyhold land; and it was held that this was no destruction of the custom; but that after the estate for life ended, the lands might be granted by copy again, and that the rule that copyhold lands must be always demised or demisable time out, &c. extends only to common persons, and not to the case of the king; and the reason given was, because the king's grants are not to be taken to a double intent, *viz.* to pass an estate for life, and to infranchise the lands too. This case came in question afterwards in 1664. and so adjudged; for the jury gave no special verdict, but found the lands to be copyhold, which it seems they would never have ventured to do, had not the court been clear of opinion that the custom was not destroyed. But yet it is said in *Lex Cust.* 233. that there is a case in *Rolls* against this. *Ideo quære, see Lex Cust.* 79, 80. If a copyholder hath had, time out of mind, a way over another copyholder's ground, and he purchases the inheritance of his own copyhold, yet the way remains. A copyholder marries the

1 Roll. Abr.

498.

1 Roll. Abr.

933.

Co. Cop. 172.

Heydon's
case.

Savil's Rep.

the lady of the manor, this is only a suspension of the copyhold estate; so if a Cro. El. 7. copyholder hath the manor in execution: It seems to me in this case, that the husband and conusee being lords for the time, may make voluntary grants of their own copyhold lands, as well as of others that come into their hands; for though they Cro. El. 7. are not copyholders (neither are they so when copyholds escheat) yet they have copyhold lands that have been demisable time out of mind, &c.

In that case if the husband he and his wife suffered a recovery of the manor to the use of themselves for life, remainder, &c. This was adjudged to be a destruction of the copyhold estate; for then the lands were conveyed by a common law conveyance, and so the custom was broke. If there be three copyholders, and one takes an estate by livery for life, it seems this does not destroy the customary interest of those in remainder.

One is seised of a rent-charge by prescription, yet without prescription he cannot distrain the copyholder's beasts; for the copyholders are in by as high a title, viz. Prescription. Copyholder for life, the lord lets the manor, with all mines, to J. S. who, living the copyholder for life, enters and digs a new pit, and takes

1 Rol. Abr.
669, 670.
Jones 243.

1 Roll. Abr.
106.

coals and converts them; the copyholder brings trover, and it was held it lay; for that the coals, after they were dug, belonged to the copyholder; *sed quære*; for they are as much parcel of the inheritance as timber-trees. If copyholders prescribe to have common in the lord's waste, and the lord destroys the common by putting conies in it, every copyholder may have an action upon the case against the lord. If a stranger puts in his beasts, whereby the copyholder loseth his common, it seems he may have an action of the case against him, as well as distrain his beasts damage-feasant. But if the damage be so little, that notwithstanding the copyholder may take his common, then it seems no copyholder can have any action, because the damage is not done to him, but to the owner of the soil. The same law if a stranger dig the turf up; for though he cannot have an action for digging up the turfs, because they do not belong to him, yet if that be the means by which he loseth his common, the loss of his common is a prejudice to him, for which he may have an action. If a copyholder, by licence, makes a lease for years, and afterwards enters upon the lessee, he is a disseisor, for he can gain no particular estate.

2 Leo. 202,
211.

2 Brown. 146.

1 Roll. Abr.
89.

1 Roll. Abr.
662.

If

If a copyholder die seised, and the lord admits another, who enters, he is not a disseisor, but only a tenant at will, because the lord assents to his coming in.

* How emblements shall be disposed of in copyhold cases, see 5 Co. 115. 1 Rol. ^{254.} ^{Hob. 215.} ^{Noy 27.} *Abr.* 727. Lord of a manor having a copyholder a lunatick in his custody, grants over the custody to another, who brings an action in his own name; it was held not to be well brought; for the committee hath no interest, but only a bare custody; and therefore the action ought to be brought in the lunatick's name; and by the same reason, the lord himself could not bring an action in his own name; for if he had interest himself, he might have assigned it over. This being a bare custody, the grant by the lord could be no enfranchisement of the lands.

It was held by *Hobart*, that the lord of a manor *de communi jure* hath not the custody of a lunatick's lands; but there must be a custom to warrant it. But it was resolved in the case between *Evers* and *Skinner*, that the lord should have the custody of one that was *mutus & sur-*

* 1 *Rolls Abr.* 727.

Of customary and

dus, and no custom was laid; and the question was between the *procbein amy* and the lord; and the reason given why the lord should have the custody is, because otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom, as where there is. And if the custody of one that is *mutus & surdus*, of common right belongs to the lord, by the same reason of one that is lunatick; *Ideo quære*.

1 Leo. 266.

1 Co. 87. 2.

If there be a custom in a manor that the lord shall enter and enjoy the lands during the nonage of the infant, it is a good custom; for the freehold of the lands is in the lord, and he is tenant to the *præcipe*. And an estate at will may cease for a time, and revive again, as well as it may descend by custom.

Cro. El. 524.

A lord of a manor may avow for the rent or service of his copyholder, in any court at *Westminster*; for he has an estate at common law in the rent, and not a customary estate; and it is due to him upon the same grounds and reasons in law as the rent of freehold lands is.

Stra. 786.

1 Roll. Abr.

374.

1 Sid. 58.

Carthew 91,

92.

Fines for admittances and copyhold rents are arrear, then the lord sells the manor; he is *sans* remedy, both in law and equity; *sed quære*; for debt lies for a fine, and if it be a duty, surely the passing

passing away the manor will not make it cease to be a duty. *Quere*, Why he shall not have debt for the rents due by the copyholder, and whether the lord hath not a freehold in them.

Copyhold lands are only impleadable in the lord's court; for the common law doth not take notice of such base estates; therefore if an erroneous judgment be given, no writ of false judgment lies, but only a petition to the lord in nature of false judgment, or else the party grieved may have remedy in chancery. One recovers in a manor, no precept can be made to take the *posse manerii*, and give the party possession by force; for the law will not suffer any body to take such power into their hands, without the king's writ.

Copyholder's lease is no disseisin to the lord. ² *Brown*. 40. *contra*. ¹ *Brown*. 133.

If one surrenders to the lord, to the intent he should grant it to another, and he admits him, this is good; for the other may plead it as a grant.

Copyholder may prescribe in his lord, being a spiritual person, to be discharged of tithes.

If a custom be altered by consent of lord and tenants, it seems chancery will

compel them to stand by that alteration.
Quære, Whether it will reduce a fine uncertain into a certainty, at the suit of all the copyholders; for though there be an equity in moderating an excessive fine, yet it seems there is none to reduce an uncertain fine to a certain one, at the suit of the tenants. If a copyholder commit a voluntary forfeiture, there seems no equity in relieving; copyholders must be relieved in chancery for their common. Chancery will compel to let a tenant sue at law, without a forfeiture. So it will compel a licence to let, and also to admit a mortgagee to try a custom at common law. After forty-three years possession, a defendant was ordered to admit of a surrender and admittance.
Lex Cust. 326.

Lex Cust.

319, 320.

Toth. 108.

65.

2 *Keb.* 357.

Lex Cust.

323, 327.

Copyholder for three lives covenants, in consideration of money paid, to surrender, and dies before surrender, and purchaser dies; it was agreed the heir of the copyholder should surrender to the purchaser's heir, and make good the assurance. See other good cases, where chancery will and will not relieve in copyhold cases, in *Lex Cust.* from p. 323 to 331. *Moor* 552. *Toth.* 197.

Copyhold lands cannot be exchanged by deed, but there must be a surrender and admittance thereupon. A right to a Co. Cop. 97. copyhold may be extinguished by a release,^{98.} but no estates can pass by release; nor by lease and release, though the lease be by surrender; for a release cannot enlarge a copyhold estate.

Commissioners of bankrupts bargain and sell copyhold lands; the estate is in the bargainee before admittance, though he may not enter and take the profits before admittance, which the statute ordained as a cautionary remedy for the lord for his fine. Therefore, if there be a custom in a manor that if a copyholder die seised of a customary estate of inheritance, that the wife shall hold the lands for her life; and such a copyholder becomes a bankrupt, and the commissioners bargain and sell the lands by deed indented and inrolled, and then the bankrupt dies; the wife shall not have her widow's estate; for her husband did not die seised. My lord Coke says, that the word *Surrender* is *volucabulum artis*; *Ergo*, where a surrender is necessary, no other word will supply the want of it; as the words *Give, Grant*, or the like; *sed quare* well of this matter; for in *Belfield* and *Adams's* case, it is held that any words expressing his inten-

Cro. Car.
569.

Co. Cop. 102.
Winch 57.
67.
3 Bull. 80.

tion of surrendering, are good enough. And this saying of a copyholder in court, was held to be a sufficient surrender, viz. that he was weary of his copyhold, and requested his lord to take it again. See *Lex Cust.* 103, 104. Lands were appertaining to a house, and the copyholder surrendered the house *cum pertinentiis*; adjudged the lands did not pass.

Hutt. 81.

Cro. Jac. 526.

Cro. El. 717.

Co. Cop. 124.

1 Co. 46. b.

Winch 3.

Co. Cop. 12,

68.

2 Rol. Rep.

236.

Examination of a feme covert, by the steward out of court, though it did not appear that he was steward by patent, or that there was any custom for such an examination, was held to be good.

If the king grant *omnes terras dominicales manerii de W.* the customary lands held by copy do not pass, but in the case of a common person they do. It is said in *Lex Cust.* 92. to be adjudged that if a man grant all his demesne lands, his copyhold lands will not pass, if he has other lands to satisfy the words of his grant. It seems this must be understood of those lands that he holds by copy, or else it thwarts the case before; and the reason is, because copyhold lands do not pass by such conveyance, but by surrender. If copyhold lands escheat, and are in the king's hands, and he grants *omnes terras suas dominicales, quære*, if they shall pass. It seems every thing demisable by copy must
be

be parcel of the manor; for the custom can only extend to the manor, and the pleading is *quod infra manerium*, &c.

Lord of a manor grants the stewardship to S. for life, and after becomes lunatick, and the custody is committed to A. B. and others; they cannot by their steward grant estates by copy; for they have no estate in the manor, and therefore are not *domini pro tempore*; but the lunatick by his steward may grant copies. Tenant in tail of a manor discontinues and dies, and then the discontinuee makes voluntary grants; these may be avoided by the issue in tail; for the estate of the discontinuee is defeasible and tortious.

Guardian in socage may hold courts in his own name, and may grant copies. *Lex Cust.* 88.

If one be retained steward by parol, it is good to make him steward at will; and as to all points he is as effectual a steward as one retained by patent. There is a difference taken in the case between *Blagrove* and *Wood*, between the steward of a manor and the steward of a court; for that the steward of a manor may take surrenders out of court, but the steward of a court cannot. But this distinction is taken no where else, and seems to have no authority in it, being only affirmed by.

by one counsel, and denied by another.
 Cro. El. 48. Lord of a manor makes a steward *ad exequend. per se vel sufficient' deputat' suum*, who makes *A.* his deputy *pro hac vice*, to take a surrender of baron and feme to the use of baron and feme for their lives, the remainder over in fee, & *ulterius ad faciendum quantum in me est.* *A.* takes a surrender from the baron and feme, upon condition the lord shall grant it to them for their lives, the remainder over in fee. In this case it was agreed that this deputation *pro hac vice* was good, and that the surrender was good enough (though the authority was to take an absolute surrender, and this surrender was conditional) by force of the words, & *ulterius ad faciend'*. The force of these words seem to me to be, that the deputy shall take any thing upon him that the steward might, to make good that thing he was to do; and they do not seem to give him an authority to take any other surrender than to the uses limited in the deputation. This case is strangely reported by *Leonard*; for there the clause & *ad ulterius, &c.* is not put in, and the surrender was upon condition to pay money, which seems clearly cut of the authority the deputy had.

A steward *ex officio* may make voluntary grants. Co. Cop. 124. Auditor and surveyor for the county of N. appointed a steward for one of the manors *pro illa vice*. Adjudged they had no authority to do it; *sed quare*, if they may not retain a steward by patent. Things of necessity, done by a steward, though he have no authority, are good; as admittances upon descents or surrenders; but voluntary grants are not good by such a steward. If a lord command his steward not to grant such lands by copy, and he doth it, it is void. So if in his grant he diminish the ancient rent and services. It is held by Coke, that if an infant is not capable of the office of steward of a manor, either in possession or reversion; yet there is a case where the grant of a stewardship to an infant in reversion *exercend' per se vel suff' dep' suum*, was held good. And it was held there, that if that clause were in, *exercend' per se vel suff' dep' suum*, the grant was good, unless he were of such tender years as not to be able to make a deputy. My lord Coke allows an infant, that has the office of steward by descent, may make a deputy, though the clause of *per se, &c.* be not in. *Sed quare*, Whether he may do it if he have it

Cro. El. 699.

Co. Cop. 126.

4 Co. 39.

Inst. 3. b.

Cro. Car. 556.

Co. Cop. 129.

it by purchase. The case in *Co. Lit. Cro. Car.* seems to be against this.

Co. Cop. 125. *Coke* says, the law is not very curious in examining the imperfections of the steward's person, nor the unlawfulness of his authority; for be he an infant, *non compos*, lunatick, outlawed, or excommunicate, yet whatsoever things he performs as incident to his place, can never be avoided for any such disability, because he performs them as a judge; at least, as custom's instrument. By this my lord *Coke* seems to allow that an infant is capable of the office; for were the grant to him void, then voluntary grants made by him would not be good; which yet my lord *Coke* seems to allow, when he saith, that whatever things he performs, as incident to his place, can never be avoided; and one incident to a steward's place, is to make voluntary grants; and he seems indeed to put him in the same place with a lunatick person; and a grant by him is, without all question, good. It may be he meant here, where the infant has the office by descent. However it be, it seems clear that an infant is capable of the stewardship *exercend' per se, &c.* and where he is of years of discretion, perhaps he may exercise it himself; for it was said
in.

in the case of *Young ver. Fowler*, that the Cro. Car. 556. infant in that case, being eleven years old, was able to exercise the office himself, or make a deputy; and something there is darkly expressed, which yet seems to intimate that he may execute it himself. As for the authority of the steward, saith my lord *Coke*, though it prove but counterfeit, if it come to exact trial; yet if in appearance, or outward shew, it seems carrant, that is sufficient.

If a grant be made to one, and through some defect it is avoidable; yet the courts kept by such a steward, before avoidance, shall stand in force; and whatever he did as steward, is for ever good. This seems very reasonable, and doth not at all thwart the distinction taken before; for there the steward had no authority; and so only necessary acts by him are good. But here he had authority, and was to all intents Co. Cop. 125. and purposes steward, till the avoidance; ^{b.} and so all acts, by him done, shall bind. And perhaps this may be the reason why the acts of an infant are unavoidable, that the grant is not actually void, but only voidable; and so before the avoidance of the grant, he is absolute steward. My lord *Coke* is so far from overthrowing the aforesaid distinction, that he takes the same himself; but adds farther, that one that

Of customary and

has no manner of pretence nor colour for keeping of courts, if he assumes the steward's place, whatever he does will not be void, especially if a precept be given to the bailiff to give him warning, which seems very reasonable; for the faint authority of the steward is allowed in other cases, for the security of purchasers, who can never know the steward's right; and no harm is done to any body, the case standing indifferent between vendor and vendee. Therefore where harm would be done (as where the lord's lands and property are disposed of by voluntary grants) there such steward can do nothing. But when a steward hath no pretence of title, there every body must take notice of his wrong; for if they were not obliged, it would be impossible for the lord to do any thing according as he thought fit; for any stranger might thrust himself into the employment, and introduce whom he pleased to be tenants. As the law doth not examine the imperfections of the lord from whom the interest passes; so neither doth it examine the steward's, who is restrained by law from prejudicing the lord. And as disseisors, &c. may do necessary acts, so may those stewards who have as little title as disseisors.

My

My lord *Coke* says, that the lord may make admittances and grants by copy at what place he pleases; but the steward of the manor, at any court held off the manor (for out of the court, it is said by him in another place, he may make admittances and grants by copy) cannot make any admittances or grants by copy. This seems to imply that the lord may make by copy grants and admittances at a court held off the manor; or else where is the difference between the case of the lord and steward. And in the next case but one, it is resolved that if the steward at a court held off the manor, make any grants or admittances, they are all void; but he says nothing of the lord. In his comment upon *Littleton*, he says the court-baron must be held upon the manor, else it will be void.

As *Melwich's* case is reported by *Croke*, Cro. El. 103: it is there said, that if the lord grant away the freehold of his copyholds, the grantee may hold courts where he will, to make admittances and grants. If then a grant by copy or admittance should be made at a court held off the manor, though it be a court-baron, why should it be void? Since a court-baron contains in it two courts, one for the freeholders, the other for the copyholders; and since that for the

the copyholders, as to grafting copies, &c. may be held off the manor, there is no reason, that because the court-baron is void, that therefore the admittance should be void; for they are as two distinct courts; and the admittance had been good, had the court been only the copyholders court. And if we look back to the reason of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor; for it is no judicial act; if it were, surely it must of necessity be done in court; and therefore it was held *per tot' cur'*, that a court to do these things might be held off the manor: It is not distinguished in this case between the grant of the lord or steward: But *Coke* is express that grants by stewards at courts held off the manor are void. *Ideo quære de hoc.*

1 Leo. 288.

Co. Cop. 129.

A steward cannot *de communi jure* make an under-steward, unless he has power by his patent, or be an infant that has the office by descent, or be a person of that quality that it will be a disgrace to him to hold the courts himself; as if he be an earl, &c. Custom that if a copyholder holds lands in fee, and his wife survives him, that she shall have it in fee, & *sic e converso*. And so the custom for an executor to hold for a year after the death of

Noy 2.

Noy 29.

of the copyholder, is a good custom, where the wife is to have her *free bench*. Copyholder (where there is a custom for the feme to have her widow's estate) makes a lease for years; she shall not avoid the lease; for the lease being made according to the custom, his title is as good as hers; but if the lease were made without warrant, then she may. It seems to me, that the feme shall not in this case be endowed of the third part of the rent and reversion, because customs ought to be strictly pursued, and that is only to be endowed of land; yet it seems after the lease ended she shall be endowed, for the husband did die seised (the possession of his lessee being his own possession). But it was agreed in this case, that by special custom the feme might avoid the lease. This among other cases proves that a copyholder may dispose of his land, and bar his wife of her free bench, unless there be a particular custom that she shall avoid any alienation, &c. made by him; for then the particular custom shall, as it seems, avoid his charge as well in the case of copyhold as freehold estates, by the common law.

Lord enfeoffs his copyholder in fee where the custom was, that if a copyholder in fee die seised, his wife shall have

Y

frank

Cro. Ja. 36.
Moor 758.

Co. Ent. 123.

Cro. 569.

Cro. Jac. 126.
Carthew 276.

frank bank; the copyholder died; adjudged the wife was barred; but had the lord enfeoffed a stranger, she should have had her free bench, because the land remained copyhold, and the custom not taken away.

3 Leo. 81.
Co. Cop. 94.
Moor 123.
4 Co. 61. b.

It came to be a question in *Skipwith's* case, whether the custom for feme covert to devise lands to their husbands, or any body else, were a good custom; but judgment was given upon a defect in the pleadings. It was held by all the justices, that copyholds are out of the words of the statute 34 & 35 H. 8. of wills; but *Anderson* held them to be within the equity of that statute. *Quere* well, whether such custom be good to devise; and see the books cited in the margin.

Winch 27.

March 8.

If the husband be attaint of felony, it seems the wife shall lose her dower in the copyhold lands, although there be no special custom; for this amounts to an alienation. It is said in *Lex Cust.* 46. that the lord of a manor cannot grant a copyhold in reversion without a special custom. If this be understood where copyholds are only grantable for life, it seems reasonable enough; but where they have been granted in fee, there if the lord grant to one an estate for life, that he may not afterwards grant the reversion in fee to another, seems very unreasonable.

Custom

Custom that if a copyholder do not ^{March 161.} repair, it shall be presented by the homage, the tenant amerced, and the lord shall distrain upon the copyholder or under-tenant; this is a good custom; for the under-tenant is not a meer stranger. Custom, that after the death of tenant for ^{Mod. 842;} life, the lord is compellable to make a ^{788.} grant ^{2 Brown. 85.} for life to his son; and if no son, ^{Noy 2.} to his daughter, is a void custom; be- ^{Cro. Jac. 368;} cause it obliges the lord who hath the interest, to grant it to this or that particular person, whether he will or no. But a custom for a copyholder for life to nominate his successor, is good; for that is a right and interest vested in tenant for life. *Sed quare.*

Custom for the steward to make by- ^{March 28;} laws for the ordering the common; is a good custom. An order made that a tenant should not put in this or that beast is void; because it takes away his inheritance; but if it were that he should not do it before such a day, that is a good by-law, being not restrictive of his inheritance, but only directive of it. ^{Leo. 196.}

Custom that he that lives above ten ^{Mod. Rep. 77.} miles from the manor; upon paying 8d. ^{1 Sid. 361.} to the lord; and 1d. to the steward, ^{2 Keb. 344;} should be excused from attendance upon ^{380, 851.} the court; this is a good custom: If he

Of customary and

avers there are copyholders sufficient to keep court that live near the manor; or else surely the custom will be void; for then no court can be held. As this case is reported by *Siderfin*, it is said it was held a good custom, because the court was a court-baron, where the suitors are judges; but it seems to me to be all one; for that if it were a customary court, if sufficient copyholders were near the manor, it is unreasonable to oblige persons that live a great way off, to attend; and if the court be a court-baron, if there be not a sufficient number of tenants that live near the manor, to do the duty, then copyholders are obliged to do it in that court as well as freeholders; and therefore it seems the custom cannot be good, for no court can be held.

Mo. 8.
Noy 27.

Lit. Rep. 233.
Hutton 126,
127, 101.

Cro. Ja. 671.

Custom that a copyholder shall not alien without licence is good. That a lessee may hold the lands half a year after the term, is no good custom. Custom, that if a copyholder make a lease for a year, and die, that it shall be void against his heir, is a good custom.

Custom was to demise land, the lessee paying the treble value of the rent; and if he died within the term, that his heir should have it, paying one year's rent; and that if he assigned, the assignee should have

have it, paying a year's rent. This was held to be a good custom.

Custom that if a copyholder will sell his land, the next of blood shall have the refusal, or the next neighbour to the east, or the like, is a good custom. It seems the reasonableness of a custom is to be considered, not from the rules and maxims of common law (for there is no custom, but what in some point or other overthrows the common law) but from the conveniency of the thing itself. As if there be a custom that a copyholder shall not put in his beasts to take the common before the lord has put in his; this is a void and unreasonable custom, because it is in the power of the lord by this means to take away the interest of his commoners: So a custom that the tenant shall pay a fine upon the marriage of his daughter is void, because it is against the freedom of the subject; but if a man obliges himself to such a thing by tenure, it is good, being his own contract; so a custom may be void for the uncertainty; as if a feoffment be made by an infant, it shall be good, if he can tell 12 *d.* or that tenants ought to pay or ought not to pay above two years rent for a fine. Custom of a manor was, that if a man took a customary tenant to wife, and outlived her,

2 Brown. 277.
Co. Cop. 70,
71.
Lex Cust. 34.

Co. Cop. 73.
2 Roll. Abr.
264, 5.

2 Leo. 109,
208.

Of customary and

he should be tenant *per* curtesy. And a man took a woman to wife who had no copyhold land then, but some descended to her during her coverture; it was adjudged he should not be tenant *per* curtesy, because he is out of the custom.

1 Roll. Abr.
511.

Custom was, that the lord might *solummmodo* grant estates in fee; This word *solummmodo* was expounded to mean, that he had only used to grant estates in fee; and so it was held he might grant for a less time; but suppose it had been shewn and pleaded that he could not grant any otherwise; *quare* of that.

1 Roll. Abr.
568.

Custom was, that when a copyholder sells his land, proclamation shall be made at the next court-day; and if any of the blood of the vendor will give as much money, he shall have it. If the land be sold for money, and any thing else, it seems to be out of the custom. The case was, the land was sold for money, and in consideration of a cure done to the vendor by the vendee, it was held the next of blood could not take advantage of the custom.

1 Rol. Abr.

511.

Hales accord.

Co. Cop. 132.

* 155. cont.

Copyhold is granted to two for the lives of three persons, and tenants *pur auter vie* die, living the *cestuy que vies*; there shall be no occupant, but the lord shall have the estate; for no body can gain a copy-

copyhold by occupancy, but by admission of the lord: But it seems, if the limitation had been to the tenants and their heirs, during the lives of the *cestuy que vies*, the heir in such case would have the estate, and not the lord, because he has excluded himself, and expressly granted the copyhold to the grantee and his heirs, during such a time; but then it seems the heir must be admitted and pay his fine. It seems he must only pay a purchase fine, and not such a one as is paid upon a descent; for he doth not take by descent, but by special occupancy.

Copyholders may have *solam & separatam pasturam* in the soil of the lord, and exclude the owner. If a copyholder let for years by licence, this is not extendable in the hands of the lessee; for the statute which gives execution of lands, extends not to copyholds. 2 Sand. 326, 327. Roll. Abr. 888.

It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines; neither can the lord dig in the copyholders lands, for the great prejudice he would do to the copyhold estate; and the copyholder himself seems to have no interest in the inheritance of the lands. Copyholder may dig for marl to lay upon the copyhold land: He cannot inclose where it was never inclosed before. 1 Sid. 152, Winch 8.

Copyhold not forfeited or determined by outlawry. Copyholder shall have aid of the lord, where the right of the seigniorie comes in question. If he hath had aid of a bishop, and then the temporalities come into the king's hands, he shall not have aid of the king, because of the delay.

**Lit. Rep. 234
2 H. 6. 37.
39.**

Style 311. Custom that a copyholder may give a warrant of attorney to another to surrender after his death, is a void custom.

**2 Rol. Abr.
157.**

The king grants a manor in fee-farm, the lands and goods of copyholders are not liable to the rent, because they come in by prescription, which is before the rent. Estates of copyholders, confirmed by decree in the exchequer or dutchy chamber, shall be good, according to the said decrees, by the 7 *Ja. 1. c. 21*. But it seems from the words of that act, that it only extends to those decrees made after the first day of the session of that parliament, and two years next ensuing that time.

**2 Roll. Ab.
197.**

A bishop or tenant in tail, &c. lets copyhold lands by deed indented; the issue or successor may grant this by copy again; yet they may make leases according to the statute to bind: Though no man can have an action of forcible entry, but he that hath a freehold in the tenements; yet if the lord should forcibly enter

enter upon his copyholder; it seems he may be indicted for it; (for if another enters, there is no question but it is a disseisin (to the lord) for it is not requisite to the maintaining the indictment, that he that disseises should gain a freehold; *sed quære*, whether he that is entered upon must not have a freehold; for the 21 J. 1. c. 15. gives restitution of possession to a lessee for years, but no indictment; and had an indictment lain before, that act had been needless; for where an indictment lay, there restitution was to follow.

If a copyholder dies, his heir under the age of fourteen, the next of kin shall not have the custody of the copyhold land; for the right of appointing a guardian for them *de jure* belongs to the lord, that so he may be sure to have the services done him. This is a particular reason why the lord should have the custody of the lands, against the common rule for the guardian in socage. But the reason not extending to the custody of the body, it seems the guardian in socage shall have the body. This guardianship, saith Coke, *de communi jure* belonging to the lord; the copyholder cannot by his last will and testament appoint another guardian: *Quære*, Whether at this day by force of the statute 12 Car. 2. c. 24. the devisee of a child shall have the

F. N. B. 552.

Co. Cop. 24.

Co. Cop. 155.
165.

the guardianship of the child's copyhold lands. For the words of the act, see the statute at large.

- Co. Cop. 38. Copyholders pay no relief, for that is a service only due from freeholders. The quality of the lord's estate is not regarded in voluntary grants by copy; for if he be but *dominus pro tempore*, it is sufficient; for if baron and feme grant copies, the feme shall never avoid this after the death of her husband; but if he alone grant, it seems she may, for he had nothing but *jure uxoris*. Two jointenants of a manor, a copyhold escheats, one may grant the whole, for he is *dominus pro tempore*, and is seised *per my & per tout*. Lord grants a copyhold for life, where they are grantable in fee, the grantee surrenders to the use of another in fee, the lord admits *secundum officium sursumreditionis*; an estate for life only passes. If a copyholder surrender to the use of his last will, and by that devises it to two, and the lord admits one, this shall enure to both; for when he is admitted, he is in by the surrender, which he cannot be unless he be a jointenant; for that is his title by the surrender.
- Co. Cop. 90. a copyhold for life, where they are grantable in fee, the grantee surrenders to the use of another in fee, the lord admits *secundum officium sursumreditionis*; an estate for life only passes. If a copyholder surrender to the use of his last will, and by that devises it to two, and the lord admits one, this shall enure to both; for when he is admitted, he is in by the surrender, which he cannot be unless he be a jointenant; for that is his title by the surrender.
- Co. Cop. 97. for life only passes. If a copyholder surrender to the use of his last will, and by that devises it to two, and the lord admits one, this shall enure to both; for when he is admitted, he is in by the surrender, which he cannot be unless he be a jointenant; for that is his title by the surrender.
- Co. Cop. 113, 114. A copyholder dies; a stranger before the admittance of the heir comes and surrenders to the use of the heir and his wife; he

he shall ever claim jointly with his wife by force of this estoppel. If he had been admitted first, and then the surrender had been made, *quære*, Whether he had been estopped.

Quære, Whether tithes are grantable by copy. See *Cro. El.* 814. & *1 Roll. Ab.* 498. where it is said they may, as well as a rent-charge.

Things that lie not in tenure, are not *Co. Cop.* 116: grantable, unless appendant to something that does lie in tenure; for first, no rent can be reserved out of them, because there can be no distress taken upon them, and then they are not parcel of a manor, which consists only of demesns and services. But then it will be objected, that a rent-service is parcel of a manor, and grantable by copy; for a manor may be granted by copy, but a rent-service may be distrained for; and if it be granted by copy, it cannot be granted alone, but lands must be granted with it, upon which a distress may be taken; and as it is part of a manor, it is held of some superior lord.

Per se it seems a rent-service cannot be granted by copy, no more than rent-charges, or commons in gross, which yet may be granted by copy, as they are appendant to any other thing. No service
can

can be reserved or due upon the grant of incorporeal things; so that no court can be kept by the grantor, no attendance being due from the grantees of incorporeal inheritances; so as to them there is no lord, and consequently they cannot pass by surrender and admittance, and so are not grantable by copy; and therefore where *Coke* says, that any thing parcel of a manor may be granted by copy, or any thing concerning lands and tenements, that must be meant parcel of the manor, and no incorporeal things in gross are parcel of a manor.

Co. Cop. 118. Things grantable by copy must be things of perpetuity, for otherwise it can never be shewn that there hath been a custom to demise them by copy; yet a man may grant by copy twenty loads of wood to be taken by the grantee; for it is not requisite that the grant should have continuance, but that the thing granted by copy, should be a thing of perpetuity, which trees are, for a man may have an inheritance in a tree; yet it seems no service is due from the grantee in such a case: But then trees while growing, are held; and a tenure may be reserved upon the grant of them, though no service be due upon the grant of twenty load; of which *quare.*

A

A steward of a manor cannot license Co. Cop. 122. persons to alien by deed *ex officio*, for that is no customary thing, but a power derived from the lord's interest, and therefore belongs only to the lord, unless there be a particular custom for the steward to license, or power be given him by the lord in his patent, or otherwise. Licence to alien and admittance must be in the name of the lord,

The same exposition that is made of Co. Cop. 123. grants of freehold lands, is made of copyhold lands; therefore a grant to one and his heirs male is a fee, &c. See Co. Cop. 136, 139.

ACTIONS merely personal, a copyholder Co. Cop. 143. may sue at common law. Copyholder makes a lease by licence for years, where the custom is for the copyholder to cut down timber-trees; the lessee for years cuts down the trees; the copyholder shall sue in the lord's court to punish this offence.

A fine is due upon admittance upon a Co. Cop. 154. voluntary grant. Where the custom is for &c. a copyholder's lands to be extended, the extendor shall be admitted and pay a fine.

A. intermarries with a feme copyholder 3 Leo. 9. for years; he shall not be admitted or pay a fine if he survive. Two jointenants, the one dieth, the other shall have all by survivor, without paying a fine or be admitted. Tenant for life, and he in remainder. join

join in a grant of their copyhold, but one fine is due. So if a surrender be made, and after a recovery is had by plaint, in the nature of a writ of entry in the *post*, for the better assistance, but one fine is due.

Touching waste voluntary and permissive by an infant, a man *non compos*, a feme covert, guardian, *cestuy que use*, see *Co. Cop.* from p. 163 to 171.

Co. Cop.
170, 171.

Tenant for life of a manor, remainder in fee, a copyholder commits a forfeiture; tenant for life dies; he in remainder may take advantage of his forfeiture, in respect of the damage done to his interest. So it seems if tenant for life had aliened to another his estate, though neither he nor his grantee could take advantage of this forfeiture; yet after his death, it seems he in remainder might. If a copyholder does an act which extinguishes his copyhold, acceptance of rent will not dispense with

Co. El. 382.

it. Otherwise, where it is a naked forfeiture. The lord of a manor demises the land by copy to *A.* upon condition he should pay twenty shillings yearly to *B.* during his minority; and 100*l.* when he came at age; *A.* doth not pay the twenty shillings yearly, but surrenders to the use of *P.* and his heirs, whom the lord admits; and afterwards *B.* attains his full age, and the money is not paid him; where-

whereupon the lord enters for the condition broken, and grants it to B. and the question was, Whether the lord's admittance of P. were not a dispensation with the condition? The case was not resolved; but *Fenner* was of opinion it was no dispensation; and he argued that because the lord was only an instrument to convey, and the *cestuy que use* is in by him that surrendered; and therefore the lord's admittance was no dispensation. But surely his affirming the power of the copyholder to surrender an estate after the breach of the condition, for not paying the twenty shillings, is a good dispensation for that forfeiture, as well as if he had accepted rent after the forfeiture; for the affirming his power to grant over his estate, is as much an indication of the lord's mind for the continuance of the estate, as the acceptance. But then as for the forfeiture, that accrued after the admittance. It seems the admittance could not pass away that; for the land was charged with the condition, into whose hands soever it came. And this seems to be *Fenner's* opinion, by the reason he gives; for that the *cestuy que use* coming in by the surrenderor, the lord by his admittance, did not pass away his interest in the condition; for the question was, Whether the lord had dispensed

penfed with the condition, not whether he had difpenfed with the forfeiture of the condition broken? for that was not broken *in part*, till after the admittance: Yes, *a breach in part was a breach of the whole condition.*

Co. Cop. 105.
4 Co. 25. a.

My lord Coke fays, that prefentments of furrenders ought, in all material points, to enfue and agree with the furrenders themfelves, elfe the furrender, prefentment, and admittance thereupon, will be void; which feems reasonable; for if the prefentment in matter differs from the furrender, the lord hath no fufficient notice of the furrender; and then the admittance upon it muft in reafon be bad, and not help out the prefentment; for if the lord knew the true furrender, perhaps he would never confent to fuch a furrender; and the true furrender ought to be known, that the lord might know his tenant, and from whom to take his fervices. The admittance cannot help out, for that was grounded upon the prefentment; but if the lord had notice of the true furrender, though the prefentment did differ, yet it feems reasonable the admittance fhould enure according to the furrender, becaufe he had notice of the true furrender; and when a man is admitted, he is in by the furrender. *Sed quere,*

quare. Where it is said, that if the presentment differ in points material from the surrender, that there the admittance, presentment, and surrender, are all void : It seems this must be understood, if the time for presenting the surrender be past ; for if there should be a presentment and admittance made contrary to the surrender, sure this will not make the surrender void before the utmost time allowed by law for the surrender's being presented ; for it is no reason to say that because the presentment is void, that therefore the surrender is void ; for the surrender depends not on the presentment, though it may be void, because not presented, but not because ill presented. So that if after such ill presentment and admittance, there should be a good presentment and admittance, it seems the surrender and all the other acts will stand good.

A. copyholder in fee, surrenders to the use of himself for life, then to his son for life, then to the use of his last will ; the son dies, then the father surrenders to the use of *J. S.* in fee ; adjudged that notwithstanding the surrender to the use of one's last will, the estate remains in the copyholder, and he may surrender it in his life-time to whom he pleases.

Cro. El. 442.

4 Co. 23. a.

Z

It

1 Rol. Abr.
508.

Co. Lit. 59.

It is said in *Rolls*, that if a copyholder makes a deed of feoffment, with letter of attorney to make a livery, it is a forfeiture, though no livery be made; (*secus*, if there had been no letter of attorney to make livery); for by giving the letter of attorney he hath manifested the determination of his will, having put it in the power of another person to pass the estate; but when he hath reserved that power to himself, he may choose whether he will pass it or not.

T H E T A B L E.

Abator and Abatement.

THOUGH the mulier abates (after descent) the issue of bastard eign has both the right of possession, and the right of Propriety, *Page 31*
 For the law casts the freehold on the issue before his entry, or before the mulier can abate. 31
 So the entry of the younger brother does not abate the Elder brother's right. 28
 Nor can the possession of the heir be abated before he is actually possessed. 45
 Nor shall the heir have trespass against the abator before entry. 45
 Where a warranty attaching on the heir, bars him against abators, intrudors, &c. 135
See also Bastards, Disseisors and Entry.

Abeyance.

On a lease for years to *A.* with livery, remainder to *A.*'s right heirs, the freehold is in abeyance, &c. and the remainder void. 97,

The T A B L E.

And so if limited by way of use executed, &c.
for the freehold cannot rest in abeyance or
expectancy till the tenant for years dies.

Page 98

If tenant in tail be disseised, and releases to
the disseisor all his right; this is said to put
the estate-tail in abeyance, &c.

127

Parsons seised in right of the church, had only
estates for life, and the freehold was in abey-
ance.

110, &c.

See Bishops.

Actions.

Action ought not to be above once for the
same thing.

48

But several actions may be for different rights.

48

See title Courts.

Admittances to Copyholds.

Admittances ought to be according to the sur-
render, &c.

192, 193

The admittance of tenant for life, is of him
in remainder, &c.

163, 194

If copyholder in fee surrenders to the use of *A.*
for life, on *A.*'s death he may enter without
any new admittance, or paying any fine.

194

But generally a fine is to be paid to the lord
upon all admittances. See 195.

A. surrenders to the use of *B.* who before ad-
mittance surrenders to the use of *C.* who is
admitted, yet nothing vests in him, &c.

and

The T A B L E.

- and the admittance of *C.* was not the admittance of *B.* Page 275
- And after *C.*'s admittance, yet *B.* may pay the money and be admitted, re-enter, &c. 276
- But an heir may surrender, &c. before admittance. 276
- If land of nature of borough *English* be surrendered to one and his heirs, who dies before admittance; the younger son shall be admitted, because of the word heirs. 288
- If a custom be to surrender out of court into the hands of two customary tenants, a surrender to the heir of a copyholder before his admittance, is good. 287
- An heir during nonage is not bound to pray admittance, or tender his fine. 286
- See the form of an admittance, and by what words entred, &c. 284
- And the doctrine of admittances, &c. 275 to 289
- Quere*, Whether admittances may be by implication. 280, 281
- How to compel the lord to admit. 186, 187
- For fines on admittances. *See title Fines.*

Agnati and Cognati.

See their difference. 5, 8

Alienation of Feuds, &c.

Originally not to be without the lord's licence. 50

When liberty thereof given in three cases. 51,

Z 3

52
Two

The T A B L E.

Two manners of alienations; by fine in open court, and by feoffment, *coram paribus*.

Page 101

But no alienation without some act of notoriety.

104

See Attornment and Livery.

Tenants *in capite*, not to forfeit for alienation.

52

Allodium.

Opposite to feudal property.

2

It gave birth to gavelkind (Q.)

2

Prevailed much in the Saxon times.

2, 51

Assises.

When and for what end invented, &c.

48

An assise and writ of entry of like nature, and bar each other.

48

Money given as attornment, will not found an assise of rent, &c.

89

Attornment.

What it is ——— Derived from the feudal law.

81

The reason why instituted, &c.

81, 82

Why continued after alienations became free.

82

Makes no difference or variation from the original grant.

82

Secret attornments not *coram paribus*, how introduced.

91

Where rights must pass by grant and attornment.

75

Till

The T A B L E.

'Till attornment nothing passeth by the grant.

Page 83

In what cases, and how, and to whom to be made. 83

It must be made during the grantor's life. 89

He that owes the services must make the attornment. 84

On grant of a rent-charge or feck, the tenant must attorn. 85, 86

If the lord grant the services to the tenant for life, the remainder man must attorn. 86

Where attornment passeth the services, or not. 88, 89

Why tenant for life must attorn on grant of a remainder in fee. 90

Where the attornment of either tenant for life, or years, is good. 90

Where the tenant shall be compelled to attorn, or not. 103

Where one may be forced to attorn to his enemy. 2. 93

On a devise there needs no attornment. 104

Estates pass by fine, &c. before or without attornment. 99

Lessee for twenty years leases for ten, the second must attorn to the grant of him in reversion. 94

So where one leases for life, and then grants the reversion for life, &c. 94, 95

Where tenant in fee grants an estate for life, &c. he must yet attorn on the lord's grant of the seignory. 84

Otherwise, if he grants for life, the remainder in fee, there the tenant for life must attorn. 84

The T A B L E.

Where a remainder is granted for life, if the tenant in possession has not attorned to him, he cannot attorn to him in the reversion.

Page 84

Where the disseisee cannot attorn to the lord's grant of a rent. 86, 87

Attornment of one jointenant is good for the whole land. 89

They may release to each other without attornment of the tenant. 92

See title Feuds and Livery.

Averment.

No averment lies against one's own act or matter of record. 130

Avowry. *See Lord and Tenant, and 308.*

Baron and Feme.

Where the husband is seised in her right, he has the right of possession, and she the right of propriety. 108

And (formerly) if he had aliened it, she was put to her writ of right. 108

For he could commit no disseisin on her estate, &c. 109

Therefore the law afterwards gave her a *cui in vita*. 109

And now by 32 H. 8. she has an actual entry. 109

Marriages strictly observed by the old *Germans*, &c. before Christianity. 108

Bastard

The T A B L E.

Bastard eign, &c.

Bastards excluded from feudal successions, and why.	Page 20
Reasons why bastardy is not to be alledged after the parties death.	30
Subsequent marriage legitimates them by civil and canon law, but not by the feudal or our law.	30
Yet their personal defects die with their persons.	30
And entry of the issue of bastard eign gives a right both of possession and propriety.	30
But where mulier has entred, his re-entry gains only a right of possession.	31
Nor in that case shall his issue <i>in ventre sa mere</i> inherit.	31
Yet if mulier abates, &c. the issue of bastard eign has both rights.	31
And though the mulier be an infant, yet a descent to the issue of bastard eign bars him.	32

Battail.

Trial by battail, how introduced, and the reason of its practice.	152
When, and on what occasion, it came to be disused, &c.	48, 49, 109
None but freemen to be the champions therein.	151
Who to find the champions.	148, 151

The T A B L E.

Bishops, &c.

Bishops, Abbot, &c. how seized in right of the church. *Page 109, 110*

See and note the history of their encroachments. *110 to 120*

And see title Discontinuance.

Church, Church-Lands, &c.

See the history of the church's antient state and revenues. *110 to 120*

A successor gains no right of possession where the predecessor had none. *36*

He pays no relief, &c. for those lands are free alms. *36*

See also title Bishops, &c.

Claim and Non-Claim.

See the difference between claims of rights, and claims of liberties. *39*

Where non-claim within a year and a day is laches, or not. *40, 42, 43, &c.*

See title Laches.

Confirmations.

A confirmation defined and explained. *75*

Does not regularly create any estate, &c. *76*

Wherein it differs from a release, &c. *75, 77*

If for an hour, it confirms an interest in fee. *76*

So

The T A B L E.

So if to the disseisor's lessee for part of the term, it confirms the whole term. (2.)

Page 76

(*Contra*, If for part of the term, and no longer. See 76.)

Yet a confirmation to tenant for life, does not extend to him in remainder. 77

And *quere*, if a confirmation to one disseisor shall enure to both. 77

Where it shall be explained by the *habendum*. 77, 78

A bare confirmation of one jointenant to the other, makes no alteration. 78

Otherwise, if the *habendum* gives the sole estate. 78

So a mere confirmation to tenant for life, and his heirs, does not enlarge the estate. 78

Otherwise, if it be *habendum* the land to him and his heirs. 78

How a confirmation may amount to a new grant. 79

The lord by confirming the estate, does not pass his right in the feigniory. 80

But a release of all his right extinguishes the feigniory. 80

The lord's confirmation may abridge the tenants services. 81

But cannot enlarge them, or create new. 81

Confirming a villein to one who had him in possession, passed nothing. 80

Coparceners.

One coparcener's entry preserves the other's estate. 29

Contra,

The T A B L E.

Contra, If one of them disseise the other.

Page 29

See title Jointenants.

Copyholds, &c.

They are estates at will, and villein tenures,
&c. 155, 156

Wherein they differ from other estates at will.
155, 156

They cannot be transferred but by surrender,
&c. 157

How they are created and guided. 260

Their descent guided by the rules of common
law. 158

Ergo they shall not go to the half-blood. 158

And there shall be a *possessio fratris* to make
the sister heir. 161

Also the heir is in possession, and may enter,
&c. before admittance. 158, 163

And by his possession has a descendable estate
in him. 159

And as he represents his ancestor, so does his
heir. 159

But has no power to dispose, &c. until actual
possession, &c. 159

And he that claims (by descent) must be heir
to him who was last so possessed. 160

But copyholds in other respects do not partake
of the nature of freeholds. 160

For they are not assets in the heirs hands. 160

Nor do they carry dower, or a tenancy by cur-
tesy 160

Nor shall a descent take away an entry, &c.
160, 161

Nor

The T A B L E.

Nor shall be taken in execution by elegit, &c.	
(2.)	Page 183
In what cases they may be entailed or not.	165, 175
Where they have been usually granted in fee, a grant to one in tail, or for life or years, is good.	194
Where a copyholder, or his lessee, may main- tain ejectment, or not.	213 to 215
What are discontinuances of copyhold estates.	189 to 193
How entails of copyholds may be avoided.	174, 298
The particular tenant holds of the lord, and not of him who created his estate.	173, 174
By what means they may be extinguished or destroyed.	221, 222, 223
What are forfeitures of copyholds, or not.	See 224 to 243
Rescous and Replevin are forfeitures.	243
Forfeitures for treason, felony, outlawry, &c.	
For Waste, <i>vide</i> Waste.	240, 241
Where forfeiture of part extends to the whole.	216, 217, 246, 247
Who to take advantage of the forfeiture.	240, 244, 245
Where presentment is necessary to make a for- feiture.	231, 246
On an entry for a forfeiture, the lord shall have the emblements.	249
Where forfeitures are dispensed with or purged.	247, 248
A succeeding lord shall not take advantage of a waste done in the time of his predecessor.	249
	If

The TABLE.

If tenant for life surrenders to the use of another in fee, it is no forfeiture.	Page 191
Where non-appearance at the lord's court is a forfeiture, or not.	229
Surrenders of copyholds how to be made, &c.	See 191, 251, 252, 300
The effect of surrenders in general.	190, 252 to 266
The operation and effect of special surrenders to uses, &c.	254 to 273, 274, 283, 289
Of surrenders on condition, with limitations, &c.	See 254 to 273, 274, &c.
Of surrenders to the use of last wills.	194, 273, 274, 338
Of copyhold grants, leases, releases, &c.	188 to 302
Of a release on a disseisin thereof.	193
But <i>Note</i> ; no disseisin can be thereof; <i>quæritur</i> .	302, 309
Of fines payable on admittances, &c.	194, 195
No fine is due either on a descent or surrender, till admittance.	218
How to be demanded and assessed.	218
Said, in case of a widow's estate, no fine is due. <i>Sed quære</i> .	223, 224
Two years value an unreasonable fine, if on a surrender.	239
But on a forfeiture, &c. it seems otherwise.	240
Refusing to pay a fine (reasonable) is a forfeiture.	293
Debt lies for such fines.	See 308
Of common belonging to copyholders.	See 221, 223
Of	Of

The TABLE.

Of copyhold courts. *See* 221 *and* Courts, *infra*.

Of copyhold customs. *See* Customs.

Of lords of Manors, &c. *See* Lord *and* Tenant, *and* Manors.

What statutes extend to copyholds, or not.
See Statutes.

Courts.

When grants, &c. were omitted to be made in lords courts, and transferred to the king's court. Page 102

Where debt lies in the king's court for damages given in the lord's court. 221

Also debt lies in the king's court for a fine in the lord's court. 308

What actions lie in the lord's court. 221

When causes were drawn into the king's courts from country judicatures. 48

A court-baron cannot be held off from the manor. 217, 250

Covenant.

Though a lease is a covenant real, yet the lessee is only bailiff for the lessor. 34

A disseisor and his heirs are bound by a covenant. 34, 35

Death.

A civil death does not take away entry. 34

Descents.

Of descents which take away entries. *See* 21
to 36

A

The T A B L E.

A descent (generally) creates a right of possession.	Page 21, 23
A descent does not bar the entry of infants, feme coverts, <i>non compos</i> , &c.	32
A distress is incident on a right of possession, or a descent cast.	23
Chattles cannot descend, &c.	46
See title Bastards and Entry.	

Discontinuance.

The definition and division of discontinuances.	107, 108 to 128
Three kinds of discontinuances:	
1. By a husband in bar of his wife's right.	107, 108, &c.
2. By a bishop in bar of the church's right.	109, 110, &c.
3. By the tenant in tail in bar of his issue.	116, 117
And see the reason why in these cases entry was toll'd.	108, 109, 117
Bishops might alien the right of possession.	109
But not the right of propriety without the chapters consent.	109
The release of tenant in tail to a disseisor works no discontinuance, &c.	118
But a release with warranty will work a discontinuance.	120
Instances of conveyances which pass the right, but work no discontinuance.	120
If tenant in tail leases for life, &c. it works a discontinuance.	121

And

The T A B L E.

And a new reversion in fee is gained to the tenant in tail. Page 121

See more of discontinuances by tenant in tail. 121, 123, &c.

The reason why tenant in tail may discontinue in fee. 124

In what cases he cannot discontinue. 125, 126, 127

As where he has a right of possession, but is not possessed by virtue of the entail. 126

Discontinuance of copyhold estates. *See Copyholds, and* 189, 190, &c.

Disseisor and Disseisins.

By a disseisin in fee the whole fee is in the disseisor. 119

A descent on a disseisin creates a right of possession. 21, 22, 23, 24

And the disseisee is put to his real action. 21

A disseisor and his heir by descent are bound by covenants in a lease. 34, 35

A disseisor dying seised, though within the year and day, gives a right of possession to his heir. 43

A disseisin separates the possession and the right, 53
&c.

Where a disseisee may attorn to the lord's grant of rents, &c. 86

The disseisee's release to the disseisor's lessee, enures to him in remainder. 86

No disseisin (properly) of a right, but of the possession. 104

Ergo, cannot be of a reversion while my tenant is in possession. 104

A a

And

The T A B L E.

And his attornment does not oust me of my right.	<i>Page</i> 104
For the wrongful payment of the tenant shall not devert my right.	104
And on a disseisin of the demans of my manor, the services are still in me.	104
Where disseisees may enter into the demans, or distrain for the services.	104
'Till a right of possession is gained by descent, the disseisee may re-continue.	106
A disseisee (disseisor) having possession, may take a release of the right.	117, 118
If the disseisee disseises the heir of the disseisor, he thereby gains no right.	131
No disseisin (properly) of a copyhold, &c.	306, 309, <i>quare</i> 193

Distress.

A distress first invented, that the land might not be seised for a neglect of services, &c.	38
<i>See also title</i> Descents	6

Donatives.

They are a part of the king's <i>Regale</i> .	115
---	-----

Dower.

<i>Dos</i> and <i>Dower</i> , what it is by the civil law, &c.	107
How introduced by the feudal law.	108
A reversion after dower only a naked right.	27
	Also

The T A B L E.

Also the wife 'till endowed has only a naked
right. Page 26

The dower (or endowment) is the wife's own
act. *Quere.* 26, 27

Emblements.

The lord to have them on his entry for for-
feiture of a copyhold. 249

How emblements shall be disposed. 307

Entry.

What it is. *See* 39.

Antiently made *coram paribus*, &c. 39, 53,
83, 91, 100

Where it is not toll'd by a descent. 24, 25

Difference between a right of entry, and a
title of entry. 26

Entry of younger brother does not abate the
elder's right. 28

But it generally abates the elder brother's pos-
session. 29

The entry of infants, feme coverts, &c. is not
barred by a descent. 32

Where an entry is toll'd, the mean profits are
also. 46

Why entry is toll'd upon a discontinuance. 117

Where an escheat doth not take away entry. 25

An entry and a claim by the feudal law are the
same. 39

Threats, violence, &c. will excuse an entry,
&c. 40

Note; No actual entry is till possession. 45

The T A B L E.

See Copyholds, Disseisin, Emblements, Feoffments, &c.

Escheats. *See Entry and Feuds.*

Estates.

If estates are in possession, no livery is required;
and if in reversion no attornment. *Page* 104
Copyhold estates how created, and by what
rules guided. *See Copyholds, and* 258, 260

Fealty.

Fealty inseparably incident to a feud, draws
with it wardship, marriage, and relief. 89
98

Felony.

Of forfeitures thereby. *See Copyholds, and*
240, 241.

Feoffments.

Feoffments, and entries, thereon anciently
made *coram paribus*, &c. 39, 53, 83, 91,
100, 101

If a disseisor enfeoffs on condition, and the
feoffee dies seised, his heir gains a right of
possession. 33

But an entry for the condition broken, destroys
the estate. 28, 38

When feoffments (private) begun not to alter
the right of possession. 43

Feoffments secret prove mischievous. 49

Feoffment

The T A B L E.

Feoffment of a feud passed nothing 'till livery (or attornment).	Page 83
Nor could feudal feoffments be defeated without acts of notoriety.	92
Why tenant for life or years by re-entry, cannot defeat the whole feoffment.	92
So if either recovers in an assise or ejectment.	92
Lease to A. for years, with livery, remainder to A.'s right heirs, is a void feoffment.	107
See the ancient manner of conveying by feoffment.	100, 101
All feoffments had anciently a warranty annexed (expressed or implied).	117
Where a feoffment with warranty bars the issue in tail, or not.	127, 128
Where tenant in tail enfeoffs his heir of full age, and dies, the heir must hold by such feoffment (only).	130

Feuds, or Feods.

What a feud is, and of the vassals rights therein.	1
And how it was obtained and enjoyed.	2
At first it was very unsettled, and how it became certain.	1, 2
The lords at first entitled by election, &c. and the tenants meerly at will.	1, 2
After made certain, for years, life, or in fee.	2
A feudal property or tenure, and <i>allodium</i> are opposite.	2
The difference between them, and that the former gave birth to gavelkind.	2
A a 3	The

The T A B L E.

The division of feuds into hereditary, or for life.	Page 2
2dly, <i>Nobile</i> or military, & <i>ignobile</i> or <i>villain</i> .	12
3dly, <i>Novum</i> & <i>antiquum</i> .	17, 18, 19
Feudal successions, how introduced.	10, 11
Why at first it passed to the eldest male.	11
And he to be married with the lord's consent.	11
To go to all the descendants of the donee, of the whole blood.	12, 13, 14
But those of the half blood were excluded, and why.	13, 14
And so were the issue of a second marriage.	14
For the lord had only the first marriage.	14
The father of the feudatory was excluded, and why.	17, 18
And so were bastards. See the reason.	20
Where it shall go to the uncle.	17, 18
<i>Seisina facit stirpem</i> , a rule therein.	14
And so <i>possessio fratris facit sororem esse heredem</i> .	15
How to make claim thereto.	13, 14
Where to be <i>per formam doni</i> .	15
How escheated, and how forfeited.	17, 37, 38
How re-established when broken or divided.	12, 13
Not alienable without the lord's consent, and why.	50
Nor transferred without the tenant's attornment.	81
Feuds, when considered as a civil right.	48, 49
	Originally

The T A B L E.

Originally created by grant, &c. but now subsisting only in prescription.	Page 133, 134
Feudal tenants would not attorn to a new lord without a new warranty	134
After <i>Quia emptores</i> , conveyances with warranty had all the effects of feudal contracts.	134
1st, It repell'd the warrantor and his heirs from claiming the land.	134, 135, 151
2dly, The warrantor might be vouched to defend the land, &c.	138, 153
3dly, The tenant of the land might have a <i>warrantia chartæ</i> , &c.	138, 153

Fines.

Fines, why so called.	100
How and upon what motives originally introduced.	102
It passed nothing but what the grantor could seize.	103
It passes the estate before (or without) attornment.	99
And the grantee should have wardship, or enter for a forfeiture or escheat before it.	99
But could not distrain or have action of waste, &c.	100
Or a writ of entry <i>ad communem legem</i> , or in <i>consimili casu</i> , &c.	100
But what the lord might seize (as heriot, wardship, &c.) he might take before attornment.	100
Antient manner of conveying by fine.	100
Fines for alienation, how they came to be disused.	50, 52
For Copyhold Fines, <i>see</i> Copyholds.	

The T A B L E.

Forfeitures. *See Copyholds and Feuds.*

Gavelkind.

That it proceeded from the *Saxon Allodium.*
Page 2

Grants.

To be taken most strongly against the grantor.	78
Where a confirmation may amount to a new grant.	78, 79
Of grants by the words <i>dedi, concessi</i> (& <i>confirmavi.</i>)	79, 80
Grant of rights of possession and propriety fe- verally.	79, 80
Where grants pass nothing 'till attornment.	85, 86
Grant of a seignior, how and by whom.	87, 88

Habendum.

Of <i>habendums</i> explaining the manner of con- firmations.	77
Of <i>habendums</i> in copyhold grants.	259

Hariot.

When payable, and to whom.	96
----------------------------	----

Heirs.

Where that word is necessary in grants of he- reditary feuds.	2, 72, 74, 76
Where	

The T A B L E.

Where it is a word of limitation or of purchase.

Page 268, 272, 288

See the words *Heirs of his Body* expounded.

271

A relief is to be paid by the heir of a disseisor.

24

The heir, notwithstanding dower, has the freehold in him.

26

Yet his reversion after seems only a naked right.

27

The heir of a disseisor who died quietly seised, gains a right of possession.

37

If a disseisor dies seised, though within a year and day, yet if no entry be, it gives a right of possession to his heir.

43

Homage, and Homage Ancestrel.

Of the vow or profession of homage to the lord.

96

See the nature and effect of that and homage ancestrel.

147, 151 to 154

The lord of the homager was obliged to defend his tenants possession by plea or battail, and to find him a champion, &c.

147, 148

And such tenant was bound to defend his lord by his body, &c.

151

That such homage had warranty annexed to it.

151

See the effects and operation of such warranty.

151, 152

And title Feuds.

See also

133, 134

Infants.

The T A B L E.

He could not pass over his tenants without their assent by attornment.	Page 81
The tenant's attornment cannot vary the lord's grant.	82
Where the lord may avow on a disseisor or a stranger.	118
The free tenants of a feudal lord were to be his champions.	151
See Battail.	
Lords of manors, their authority and power.	183, 193, 196 to 212, 250
What a <i>dominus pro tempore</i> , or other contingent lord, may do.	197 to 209
The lord himself may make admittances, grants, &c. off from the manor.	216. See 250, 251
But it is said a steward must do it within the manor.	216, 250
Yet it seems a steward, especially impowered, may do it.	216, 250
For other duties of a steward.	216, 250 and 313 to 320

Manor.

Where the grant of a manor will pass leases for years, but not for lives, &c.	105, 106
A customary manor may be held by copy of court-roll.	215
The lord but not the steward may make admittances off from the manor.	216, 217, 250
A court-baron cannot be held off from the manor.	216, 217, 250

Marriages.

The T A B L E.

Marriages. See Baron and Feme.

Maxims.

<i>Affectio imponit nomen operi.</i>	Page 44
<i>Arbitrio domini res æstimari debet.</i>	239
<i>Homagium repellit perquisitum.</i>	134, 152
<i>Matrimonium subsequens tollit reatum præcedens.</i>	29
<i>Nemo potest esse tenens & dominus.</i>	152
<i>Nemo plus juris dare potest quam ipse habet.</i>	206
<i>Possessio fratris facit sororem esse hæredem.</i>	15
<i>Quantum tenens domino tantum dominus tenenti debet præter solam reverentiam.</i>	151
<i>Seisina facit stirpem, &c.</i>	14
<i>Unumquodque solvetur eo ligamine quo ligatum est.</i>	68

Non compos, &c.

Their entry not barr'd by a descent.	32
None can stultify himself; how he may be relieved.	32
Of the custody of a lunatic and his lands.	307, 308

Notoriety.

What acts of notoriety are necessary in attaining, possessing or transferring of feuds.	39, 53, 83, 90 to 94, 118
Entry is a notoriety.	122
So is livery and attornment, and must be made <i>coram paribus.</i>	39, 40 to 43

Occupant.

The T A B L E.

Occupant.

Of a special occupancy. Page 119

Outlawry.

What forfeited thereby. 242

Perpetuity.

None where the contingency is during a life. 98

Possession, and Right of Possession.

A right of possession, what it is, &c. 84,
126

Of a naked possession, and how turned to a
right. 22

When a naked possession descends on the heir,
it makes a right of possession distinct from a
right of propriety. 26

How dower avoids the possession of the heir.
27

'Till endowment the wife has only a naked
possession. 27

Possession of the younger brother is possession
of the elder. 28

i. e. 'Till some act done that manifests the
contrary. 28, 29

Where the entry of the younger brother de-
stroys the possession of the elder. 29

No descent or act of law *tempore domesnici belli*
gives a right of possession; *contra* if in time
of a foreign war. 35

No

The T A B L E.

No possession could pass by the feudal law, but
coram paribus. Page 118

But a disseisor that had the possession might
take a release of the right. 118

And when the possession and right are separated
by the disseisin they are united by the re-
lease. 53

Note ; A disseisor has the naked possession, his
feoffee an actual or colourable possession, and
the heir the right of possession. 50, 53

See the effect of a naked possession distinct
from a right of possession ; and of a right
of possession distinct from a right of pro-
priety. 129, 130, &c.

See title Rights.

Propriety. See Possession and Rights.

Release.

A release is a conveyance of a right to him in
possession, &c. 53

So that a release unites the right to the posses-
sion. 53

Wherein a release differs from a feoffment. 53

To whom the release is to be made, and what
may or may not be released. 54

It must be to the tenant of the freehold, &c. 54

A possibility cannot be released. 54

But a freehold in law may. 54

Four kinds of releases operating four ways. 55

1st, By transferring the right. 55

2dly, By extinguishing the right (or estate). 63

3dly, By enlarging the estate. 69

4thly,

The T A B L E.

4thly, By transferring the estate.	Page 72
A release cannot be to the lessee of a disseisor, because a stranger to the freehold.	76
A release to tenant for life enures to him in remainder.	86
But not the release of the feudal lord to his tenant for life.	
Jointenants may release to each other, <i>sans</i> attornment of the tenant.	92
Tenant for life, and remainder for life, he in reversion may release to him in remainder.	92
Release by a disseisor to tenant in tail, works no discontinuance.	117, 118
Nor does it pass any right of possession, and why.	118
<i>Quere</i> , What estate a disseisor has by such release.	119
A bare release to a disseisor passes only a right.	120
But a release with warranty works a discontinuance.	121
Where a tenant in tail releases to a disseisor, puts the tail in abeyance.	127
Remainder.	
What shall be a contingent remainder, &c.	98
Where a remainder man in fee releases to the tenant for life, it does not destroy the remainder; <i>contra</i> if the remainder be in tail.	127, 128

Remitters.

The T A B L E.

Remitters.

- A remitter is the restitution of an old title,
and not the acquiring a new one. *Page* 131
- The foundation and reason of remitters. 129,
130
- Where the disseisee takes back only a naked
possession, he is remitted. 129
- Contra*, if the disseisor transfers it back for life
or years by deed, &c. 129
- And where the proprietary takes back the
estate by deed, &c. he is not remitted. 131
- Contra*, where the right of possession is cast
upon him by law, or where he comes to it
by feoffment under age, or during cover-
ture, &c. 131
- A feoffment or estate for life or years, or on
condition to an infant or feme covert, that
has right of propriety, is a remitter. 132

Rights.

- A naked possession is no right. 21
- How a disseisor may acquire a right. 22
- Where a descent creates a right of possession.
21 to 23
- The difference between a right of possession
and a right of propriety. 22, 23
- But on a feoffment on condition the feoffee has
both, till the condition broken, and an en-
try thereupon. 25, 26
- None by his own wrong can give himself a
right. 28, 34, 131

B b

There-

The T A B L E.

Therefore the disseisee, disseising the heir of the disseisor, gains no right.	Page 131
Where a right of possession may, or may not be acquired, <i>tempore belli</i> .	35
A successor gains no right where the predecessor had none.	36
A right of propriety in the <i>Saxon</i> times only recoverable in a writ of right.	47
He who has passed his right cannot impeach the estate.	79
The effect of a right of possession distinct from a right of propriety.	129, 130, &c.
A right of possession cannot be divested but by an elder title.	131
If a proprietary re-obtains the right of possession by agreement, he must so hold it.	130

Seigniory.

When, how and by whom it may be granted.	87, 88
--	--------

Services.

Of knights service, and socage services.	105, 106
The service of one man's body not to be performed by another's body, without the lord's assent.	52
Where disseisees may distrain for services.	106
<i>See</i> Distresses, Fealty, Homage,	

Statutes.

The T A B L E.

Statutes.

General rules for expounding statutes.	Page 164, 177
No general words shall prejudice the king or lord of a manor, &c.	164, 177
Where general words shall be extended to copyholds, or not.	164, 177

See the following particular statutes explained,
&c.

<i>Magna Charta</i>	101	tenants by curtesy
<i>Prærog. Regis.</i>	85	from warranty. 141
<i>De Bigamis.</i>	139	<i>West. 2. De donis cond.</i>
<i>Marlb. c. 20. of entry</i>		103, 104, 109, 142,
<i>in le post.</i>	49	165
<i>Glouc. c. 1. of damages</i>	32	<i>H. 8. c. 28. of en-</i>
<i>in disseisin.</i>	85	tries. 109
<i>Glouc. c. 3. restraining</i>		<i>Quia emptores</i> 52, 85, 95
<i>Note</i> ; Since <i>Quia emptores</i> , warranty has been frequent in conveyances.		134

Statutes extending or not extending to copyholds, viz.

Copyholds are within		32 <i>H. 8. c. 9. against</i>
<i>West. 2. De donis cond.</i>		<i>Champerty.</i> 184
165 to 171		2 <i>Ed. 6. c. 8. of tra-</i>
13 <i>El. c. 10. of Deans</i>		verses, 186
and chapters lands.		5 <i>El. c. 14. of recu-</i>
179		sants. 186
<i>West. 2. c. 3. per totum.</i>		29 <i>El. c. 5. of recu-</i>
184		sants. 188

The TABLE.

But are not within	Nor 1 <i>Ed. 6. c. 14. &c.</i>
11 <i>H. 7. c. 20. P. 181.</i>	mentioned. <i>Page 186</i>
27 <i>H. 8. c. 10. of jointures.</i>	Nor 32 <i>H. 8. c. 28. or c. 38.</i>
182	178, 187
27 <i>H. 8. c. 10. of uses.</i>	Nor 31 <i>El. c. 7. of cottages.</i>
184, 255	188
31, 32 <i>H. 8. of partitions,</i>	Nor the statute of limitations.
185	178
<i>West. 2. c. 18. of elegits.</i>	<i>Quere of other statutes</i>
186	163, 164, 179

Surrenders. *See Copyholds.*

Tenant. *See Attornment, and Lord and Tenant.*

Treason.

Of forfeitures thereby, &c. 240, 241

Trees. *See Waste.*

Trespass.

Lies against a disseisor for the entry, &c. but not for the mean profits till the disseisee's entry. 45

For though one has the freehold in law in him, yet he cannot have trespass before entry. 45

None can be a trespassor, on whom the law casts the possession. 46

Trespass lies against the feoffee of a disseisor, *i. e.* after entry. 46

It

The T A B L E.

It lies by a copyholder against his lord. *Page*

So by a feudal tenant, if his lord subject him
to another without his consent. *157*
93, 94

Trials. *See* Battail.

Vassals. *See* Feuds and Lords, &c.

Wards, &c.

Wardship, marriage and relief. *See* 88, 96,
and Feuds.

Warranty.

What it is, and whence derived. 17, 18, 120,

By what words created, &c. *133*
139

When introduced, and for what reason. 18,
134, &c.

Whom it binds, and the consequences thereof.
120, 133 to 151

All feoffments had anciently warranties annex'd.

And a recompence was always presumed. *117*
141,

The three effects of warranty anciently. *148*
135

It repell'd the warrantor's claim, it obliged him
to defend the land, &c. and (if by battail)

to find a champion. 120, 135, 138, 148,
&c.

Where a feoffment with warranty bars an en-
tail *126*

Warran-

The TABLE.

Warranties at common law of two sorts. *Page*
139, 140

Viz. Warranties commencing by disseisin, and binding warranties. 139, 140

Of binding warranties, some are altered by statutes. 140, 141, &c.

After the statute *Quia emptores*, express warranties were frequent in conveyances. 134

For the feudal tenants would not attorn without a new express warranty. 134, 154

The statute *De donis* occasioned the distinction of lineal and collateral warranties, it barring only by the former. (*Quere.*) 141, *See*
142, 143

Where lineal and where collateral warranty is a bar or not. 142 to 147

Who might be barred thereby, issue male or female. 146, 147

Where the ancestor devised lands devisable with warranty, such warranty was no bar. 149

Three reasons thereof. 149

Where one had warranted land in fee, and then took back an estate for life, &c. that did not destroy the warranty. 149

Note; A warranty may be released, or it may be discharged by attainder of the warrantor. 159

See also Feuds.

Warrantia Chartæ. *See* Writs.

Waste.

What is waste in copyholds. 130 to 136

Of waste in cutting trees, &c. 130 to 137
Waste

The TABLE.

Waste voluntary or permissive is a forfeiture of the copyhold. Page 235, 237

What wood or trees the copyholder may take, and what the lord, 134, 135

Where one may have waste, &c. although the estate is in abeyance. 127

Words expounded, &c.

<i>Calumnia.</i>	39	Heirs, &c.	268
<i>Clameum</i>	39	Laches.	40, 41
<i>Confirmavi.</i>	79	<i>Præbendum</i> & <i>Præben-</i>	
<i>Dedi and Concessi.</i>	79	<i>darii.</i>	114
Discontinuance.	107	<i>Solummodo.</i>	326
<i>Dos and Dower.</i>	26, 27, 107	<i>Stirpes</i> & <i>capita.</i>	7, 8, 9
<i>Feudum</i> or <i>Feodum</i>	1	<i>Vendicatio.</i>	39
<i>Guer. & War. &c.</i>	133	Warranty.	133

Writs.

A writ of right in the time of the Saxons, the only way to recover a right of propriety in lands, and why it was disused. 45, 46, &c.

See 117

Of a writ of *warrantia chartæ.* 18, 117, 138, 153, 154

A writ of possession to recover a right of entry. 46, &c.

A *cui in vita* was not anciently known. 47
See 108

Of writs of entry, and of assizes. 47

Of summons, *Grand cape* and *Petit cape.* 47

Writ of entry when allowed instead of battail. 49

Writ of entry in the *Post* given by the statute of *Marlb.* 49.

Of a *Quid juris clamat.* 99
Of

The TABLE.

Of writs of entry *ad communem legem* &c. in con-
fimili casu, &c. Page 99

Of a writ of ward, and of customs and ser-
 vices. 99

Year and day.

What is laches, or not, on a non-claim within
 a year and day. 40, 41, 42

If the disseisor dies seised within the year and
 day, and before entry of the disseisee, it
 gives a right of possession to his heir. 43

See title Possession and Right.

F I N I S.

Just published in one Volume, Folio,

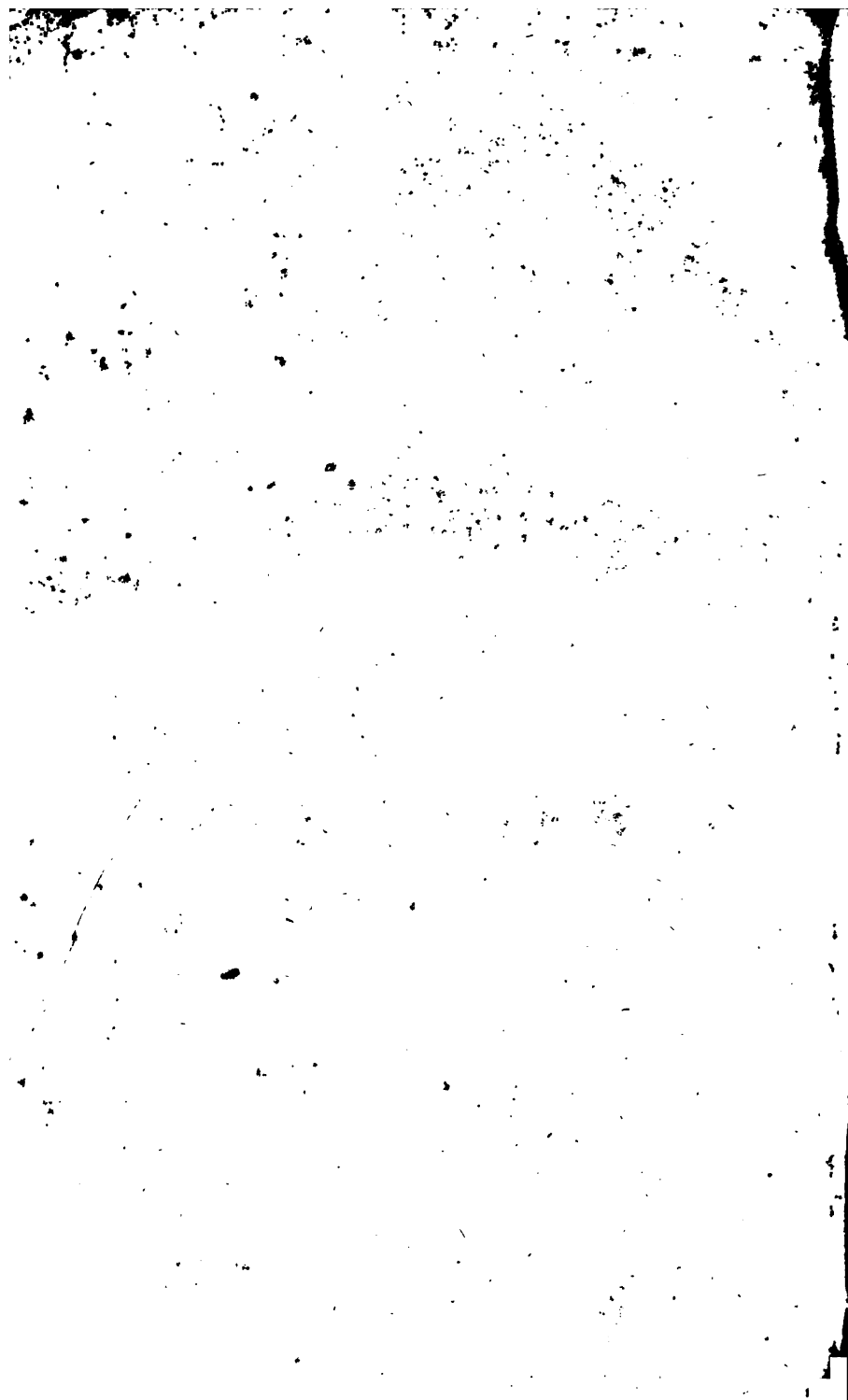
Sold by D. BROWNE, J. SHUCKBURGH and
 J. Worrall,

REPORTS of Cases in the Court of Exchequer,
 from the beginning of the Reign of King George
 the First, until the fourteenth year of the Reign
 of King George the Second.

By WILLIAM BUNBURY late of the *Inner Temple*,
 Esq; taken in Court by himself, and published
 from his own Manuscript by his Son-in-law,
 GEORGE WILSON, Serjeant at Law.

☞ *This book contains cases in the several branches of
 business in the Exchequer only, viz. upon Informations, Sei-
 zures, Extents and other Process, touching the King's Debts
 and Revenue: Also Cases in Law and Equity between Sub-
 ject and Subject. Among which are many concerning Tithes,
 and other Ecclesiastical Matters.*





DL AGH IGt3

A treatise of tenures, in two
Stanford Law Library



3 6105 044 257 678